Without a Clue and Still without a Master Plan: Municipalities Left Uncertain How to Manage Waste Disposal Crisis in Wake of Third Circuit Decision in Harvey & (and) Harvey, Inc. v. County of Chester

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WITHOUT A CLUE AND STILL WITHOUT A MASTER PLAN: 1
MUNICIPALITIES LEFT UNCERTAIN HOW TO MANAGE WASTE DISPOSAL CRISIS IN WAKE OF THIRD CIRCUIT DECISION IN HARVEY & HARVEY, INC. v. COUNTY OF CHESTER

I. INTRODUCTION

It's garbage day and Uncle Sam forgot to take out the trash, again. Although everyone forgets to take out the garbage once in a while, the government has forgotten for decades. Not surprisingly, our country home is becoming increasingly unhealthy and is looking a bit cluttered. 2

1. Jimmy Buffett, Lage Nom Ai, on BAROMETER SOUP, (MCA Records, Inc. 1995). This lyric is a poignant expression of both the confusion and frustration which state and local governments experience after efforts to control the waste disposal crisis have been invalidated on constitutional grounds, especially after great environmental and economic expense. It is also representative of the ambiguities in the law governing municipal waste ordinances, and reflective of the opinion of many political actors that decisions of the Supreme Court and circuit courts are incomprehensible, leaving state and local governments with no constitutionally valid alternatives. As a result, many leaders are confused about whether anything can be done to alleviate the waste disposal crisis without offending the Constitution.

2. See PA. STAT. ANN. tit. 53, § 4000.102(a) (1) (West Supp. 1997). In section 4000.102(a)(1) of the Pennsylvania Municipal Waste Planning, Recycling & Waste Reduction Act of 1988, the legislature found that “improper municipal waste practices create public health hazards, environmental pollution and economic loss, and cause irreparable harm to the public health, safety and welfare.” Id. Similarly, the Pennsylvania Legislature determined that the waste management measures contained and recommended in the Act, including flow control measures, “[p]rotect the public health, safety and welfare from the short- and long-term dangers of [the] . . . disposal of municipal waste.” Id. § 4000.102(b)(3).

The legislature also found that uncontrolled increases of waste production and ineffective waste management has “threatened to significantly and adversely affect public health and safety . . .” and that “[u]ncontrolled increases in daily waste volumes can also cause increased noise, odors, truck traffic and other significant adverse effects on the environment as well as on public health and safety.” Id. § 4000.102(a)(21).

Chief Justice Rehnquist captured the extent and impact of the waste problem by writing that “[t]he substantial environmental, aesthetic, health, and safety problems flowing from this country’s waste piles were already apparent at the time we decided Philadelphia. Those problems have only risen in the intervening years.” Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept’ of Natural Resources, 504 U.S. 353, 368 (1992) (Rehnquist, C.J., dissenting) (citing Carl A. Salisbury, Pollution Liability Insurance Coverage, The Standard-Form Pollution Exclusion, and the Insurance Industry: A Case Study in Collective Amnesia, 21 ENVTL. L. 357, 369-70 (1991)).
The amount of solid waste produced in the United States each year is rapidly increasing while disposal space is shrinking. The amount of solid waste produced in 1990 is more than double what it was just a few decades ago. As a result of increased solid waste generation, eighty percent of landfills that operated in 1989 will exhaust their capacities and close within the next fifteen years.


The Supreme Court has also recognized the landfill shortage crisis. See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resoures, 504 U.S. 353, 369 (1992) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that “[i]t is no secret why capacity is not expanding sufficiently to meet demand—the substantial risks attendant to waste sites makes them extraordinarily untenable neighbors.” Id. (citing Swin Resource Sys., Inc. v. Lycoming County, 883 F.2d 245, 253 (3d Cir. 1989)).


In fact, “American’s produce more garbage, both per person and in absolute amounts, than any other nation in the world.” Sidney M. Wolf, The Solid Waste Crisis: Flow Control and the Commerce Clause, 39 S.D. L. Rev. 529 (1994) [hereinafter Wolf, Solid Waste Crisis]. The amount of garbage currently produced “is enough waste to fill a convoy of ten-ton garbage trucks 140,000 miles long; ‘over five times the distance around the Earth’s equator and over halfway from here to the moon.’” Id. (quoting PAUL RELIS & ANTHONY DOMINSKI, BEYOND THE CRISIS: INTEGRATED WASTE MANAGEMENT 4 (3d prtg. 1990)).

These rates of municipal solid waste production are expected to increase. See Simpson, supra at 1093. The Environmental Protection Agency (EPA) predicts waste production will continue to increase at the rate of 1.6% until the year 2000. See id. at 1094. In the years 2000 to 2010, the rate is expected to increase by 1.5%. See id. Currently, each individual in the United States now generates about 1500 pounds of solid waste per year, as compared to an expected annual production rate of 1775 pounds per individual by the year 2010. See id. The rate of waste generation in the United States will increase by over 200 million tons per year by the beginning of the next decade. See id.

spite these national problems, Congress has failed to provide state or municipal governments with the necessary tools to effectively deal with this mounting crisis. As a result, state and local governments have been strapped with the financial burdens and planning

6. See Teece, supra note 4, at 695-96. Congress recently debated the merits of delegating powers to states and municipalities to implement various measures, including flow control. See Laura Gabrysch, Constitutional Law - Dormant Commerce Clause - Flow Control Ordinances that Require Disposal of Trash at a Designated Facility Violate the Dormant Commerce Clause, 26 ST. MARY'S L.J. 563, 597-98 nn.123-124 (1995). Unfortunately, no flow control proposals have yet been enacted. See id. at 574.

Although Congress has not passed any legislation enabling the states to effectively deal with the increasing waste crisis, it has nevertheless, debated the issue on several occasions. See S. REP. No. 104-52, at 4 (1995). The history of this debate is discussed in the Interstate Transportation of Municipal Solid Waste Act of 1995 in the Committee on Environment and Public Works' general statement as follows:

Since 1990, the Environment and Public Works Committee has held 3 hearings (June 18, 1990; July 18, 1991; and March 1, 1995) to review the issues posed by the interstate shipment of municipal solid waste. Over the past five years, the Committee has worked to develop a solution that would preserve the advantages of interstate commerce, while providing States some new authority to create a more orderly and predictable flow of waste imports and exports.

In the 102d Congress, the Committee reported S. 976, the Resource Conservation and Recovery Act Amendments of 1992, a bill that addressed a wide range of solid waste issues. Section 412 of the bill provided authority for Governors to restrict the disposal of out-of-State waste, but the legislation was not considered by the full Senate. The Senate subsequently approved separate legislation addressing interstate shipment of waste, S. 2877, the Interstate Transportation of Municipal Solid Waste Act of 1992, by a vote of 89-2, on July 23, 1992. No comparable legislation was approved by the House.

During the 103d Congress, the Committee unanimously reported S. 2345, the Interstate Transportation of Municipal Solid Waste Act of 1994 (Senate Report 103-322), to provide legal authority to every State to restrict out-of-State MSW. S. 2345 was approved in the Senate by voice vote on September 30, 1994. The legislation would have allowed every Governor to freeze MSW exports at 1993 levels, and to ban future MSW imports to facilities not receiving such waste in 1993 if the affected local community did not want to receive out-of-state MSW. In addition, the bill included an “export state ratchet” to reduce the level of MSW exports from large exporting States and an “import State ratchet” to ensure that no single State received large amounts of MSW from another State.

On September 29, 1994, the House of Representatives approved its own interstate package, H.R. 4683, and after adding flow control language, a modified version of S. 2345 was approved by the House on October 7, 1994. The legislation would have allowed every Governor to freeze MSW exports at 1993 levels, and to ban future MSW imports to facilities not receiving such waste in 1993 if the affected local community did not want to receive out-of-state MSW. In addition, the bill included an “export state ratchet” to reduce the level of MSW exports from large exporting States and an “import State ratchet” to ensure that no single State received large amounts of MSW from another State.

On September 29, 1994, the House of Representatives approved its own interstate package, H.R. 4683, and after adding flow control language, a modified version of S. 2345 was approved by the House on October 7, 1994. The Senate received the bill, including both interstate waste and flow control provisions, on October 8, 1994, the last day of the Senate session. S. 2345, as approved by the House, was not considered on the Senate floor.

Thus far in the 104th Congress, several bills have been referred to the Environment Committee that would authorize State restrictions on imports of waste in certain circumstances, including S. 456 introduced by Senator Baucus, S. 589, introduced by Senator Coats and S. 542, introduced by Senator Conrad. Generally, these bills build on the provisions of S. 2877 and S. 2345.
responsibilities of developing more effective waste management programs.\textsuperscript{7}

On March 1, 1995, Senate Environment and Public Works Committee's Superfund, Waste Control and Risk Assessment Subcommittee held a hearing on the issue of interstate waste and flow control.

In response to the testimony received at the hearing, Senator Robert Smith, Chairman of the Subcommittee and Senator John H. Chafee, Chairman of the full committee, introduced S. 534, a bill to amend the Solid Waste Disposal Act, to provide authority for States to regulate the interstate transportation of municipal solid waste and to provide States and political subdivisions authority to flow control waste. The bill, as amended, was ordered reported unanimously, by voice vote, from the Superfund Subcommittee on March 15, 1995. The Full Committee ordered the bill reported, as amended, on March 23, 1995, by a rollcall vote of 16 to 0.

Several bills authorizing flow control were referred to the Committee in the 103rd Congress, including S. 2227, introduced by Senator Lautenberg and S. 1634, introduced by Senator Heflin. In addition, during the 103rd Congress, the Committee held a hearing on the issue of flow control (July 13, 1994).

Thus far in the 104th Congress, several bills have been referred to the Committee authorizing States and political subdivisions to impose flow control, including S. 398, introduced by Senator Lautenberg and S. 485, introduced by Senator Hutchinson.

\textit{Id.} at 4-9.

\textbf{7.} \textit{See Interstate Transportation, supra note 4, at 107-10.} Randy Johnson, on behalf of the National Association of Counties and the National League of Cities stated that "[l]ocal governments provided over 17.8 billion [dollars] of the estimated costs of managing solid waste in this country - over 95% of the total costs. Not one penny from the federal budget is received by local governments to plan or implement solid waste management programs." \textit{Id.; see also Lawren, supra note 3.} The economic impacts of the shortage of landfill space and effective waste disposal planning is evident in the fact that San Francisco alone spent $2.5 million just to reserve space for its municipal waste. \textit{See id.} Similarly, facility shortages forced the City of Philadelphia to send its waste over 100 miles away for disposal. \textit{See id.}

These problems have also been highlighted by politicians during many election years. \textit{See id.} For example, in 1987, five of the seven candidates running for the New Jersey Legislature stated that the management of municipal waste was the number one issue in their campaigns. \textit{See id.} at 19-20. The former mayor of Lincoln, Nebraska supplemented this sentiment by saying that "garbage is the kind of issue that can unseat an incumbent mayor." \textit{Id.} at 20.

Mr. James V. Sears, Director of Solid Waste Management, Marion County, Oregon, summarized the economic impact of Congress's failure to authorize states and localities to deal with the garbage crisis. \textit{See Flow Control Measures and Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce, 104th Cong. 44 (1995) [hereinafter Flow Control Measures]} (statement of Mr. James V. Sears, Director, Department of Solid Waste Management, Marion County, Oregon). He stated:

\textit{[T]here have already been serious financial . . . consequences to many communities throughout the United States . . . because of the failure of the previous Congress to enact the authorizing legislation necessitated by the Carbone case. As examples of this I should note the following:}

On March 17, Moody's Investors Service lowered its rating for $237.2 million in bonds issued by Fairfax County, Virginia to construct Fairfax's
The national waste disposal crisis began in the 1970's and 80's. During these years, tax reforms and stricter environmental regulations placed substantial constraints on the effective operation of private waste disposal facilities. Consequently, landfill closures were halted in favor of environmentally advanced waste-to-energy facility. The absence of flow control legislation was the pivotal factor sited by Moody's in taking this action.

Just four weeks earlier, on February 17, Moody's lowered the bond ratings of five New Jersey waste management authorities as a direct consequence of the absence of federal flow control legislation.

... Bond rating agencies are currently reviewing many additional solid waste bond issues for possible downgrades. Downgrading will result in increased costs to the taxpayers in these jurisdictions, including increases in the cost of many other public service needs that require bond financing.

In an increasing number of communities in various states including not only Virginia and New Jersey, but also Florida, Maine, Pennsylvania, Ohio, North Carolina, New York and elsewhere, we are receiving reports of substantial loss of revenue, potential insolvency and decreases in recycling caused by the diversion of waste to environmentally less beneficial management methods. These developments are a direct result of the absence of federal flow control legislation.

Id.
became a common experience, and this, in turn, led to facility shortages and more expensive disposal costs. Pennsylvania was no exception to this trend. 

103d Cong. 93 (1993) [hereinafter Waste Flow Control Hearing] (statement of Cathy Berg Moeger, Executive Assistant, Groundwater and Solid Waste, Minnesota Pollution Control Agency); see also Harvey, 68 F.3d at 791 (stating “regulation led to a large number of landfill closures throughout the United States, creating shortages in many places and driving up landfill pricing”); Atlantic Coast, 48 F.3d at 704 (stating New Jersey’s “persistent actions to implement rigorous environmental standards on landfill[s] . . . resulted in a serious shortfall in disposal capacity”). Amendments to the Tax Reform Act of 1986 also exacerbated the waste disposal crisis by causing increased closures of private waste facilities. See generally Eric S. Petersen & David N. Abramowitz, Municipal Solid Waste Flow Control in the Post-Carbonne World, 22 Fordham Urb. L.J. 361 (1995). Until this point, the majority of waste facilities were privately owned and operated. See id. These tax amendments, however, made private ownership and financing increasingly impossible. See id. at 367 n.36. For example:

The Tax Reform Act of 1986, 25 U.S.C. § 144(e)(1)(A), . . . resulted in a reduced amount of qualified private activity bond funding which may be issued as tax-exempt securities. 26 U.S.C. § 141(e)(1)(A), 142(a)(6). Additionally, the changes essentially abolished the investment tax credit available to companies on equipment in such facilities and reduced the depreciation benefits on the property and equipment of which private owners could take advantage. The two tax elements had provided a substantial cash flow for private owners under the prior tax laws.

Id.

10. See Harvey, 68 F.3d at 791-92 (citing Petersen & Abramowitz, supra note 9, at 361 n.33); see also Roddewig & Sechen, supra note 9, at 802 (stating landfill closures resulted from increased costs of regulations); James C. Vago, Comment, The Uncertain Future of Flow Control Ordinances: The Last Trash to Clarkstown?, 22 N. Ky. L. Rev. 93, 98 (1995).

The facility closing crisis, as it affected New Jersey, was highlighted by the Third Circuit when it stated that:

By the early 1980’s, the department had closed, or was in the process of closing, over 300 unsafe or unregulated landfills that posed serious environmental hazards or had exhausted capacity. However, the department’s persistent actions to implement rigorous environmental standards on landfill construction and operations, coupled with a steady influx of millions of tons of waste annually from neighboring states during the 1970’s, resulted in serious shortfall of disposal capacity in the state.

Atlantic Coast, 48 F.3d at 704.

11. See PA. STAT. ANN. tit. 53, § 4000.102(a)(21) (West Supp. 1997). This section provides that:

[U]ncontrolled increases in the daily volumes of solid waste received at municipal waste landfills have significantly decreased their remaining lifetimes, disrupting the municipal waste planning process and the ability of municipalities relying on the landfills to continue using them. These increases have threatened to significantly and adversely affect public health and safety when municipalities find they can no longer use the facilities.

Id.; see also Petersen & Abramowitz, supra note 9, at 366. In fact, Florida and most of the northeastern United States experienced stricter environmental and tax regulations which ultimately led to the closure of private waste facilities. See id. For example, in New Jersey, over 300 landfills were closed by the early 1980’s because of unsafe conditions and exhausted capacity. See Atlantic Coast, 48 F.3d at 704. The Department of Environmental Protection and Energy continued to require more rigorous environmental standards on landfill operation and construction. See id.
As a result of waste facility closures and the lack of incentives for private ownership, public ownership became necessary.12 Municipalities entering the waste disposal and management market found the construction and operation of waste facilities to be extremely expensive.13 In an effort to cover huge capital expenditures necessary for the construction and maintenance of such facilities, states authorized municipalities to adopt waste management plans and flow control measures. The legislature designed this newly created statutory authority to ensure financing of the facilities.14 Still, these measures have received a great deal of scrutiny.

This caused additional closures and a "serious shortfall of disposal capacity in the state." Id.

12. See Harvey, 68 F.3d at 792. The Harvey court stated that public ownership was a response to the tax changes and increased costs of operating landfills stemming from increased regulation. See id. (citing Petersen & Abramowitz, supra note 9, at 367). As a result of these tax changes and increased costs, private ownership became less profitable, and as a result, less attractive. See Petersen & Abramowitz, supra note 9, at 367. Public facilities attempted to fill the void created by largescale facility closure. See id.

13. See Sidney M. Wolf, Congressional Bailout of Flow Control: Saving the Burning Beast, 7 Vill. Envtl. L.J. 263, 267 (1996) [hereinafter Wolf, Congressional Bailout] (citing Wolf, Solid Waste Crisis, supra note 4, at 538 (1994)) (stating construction of "a state-of-the-art landfill can easily cost $150 million"); see also Harvey, 68 F.3d at 792 (stating "State and federal environmental mandates often require the use of . . . more expensive facilities"). These "environmentally advanced, innovative waste disposal facilities can cost 'in the tens to hundreds of millions of dollars to construct.'" Id. (citing Vago, supra note 10, at 98); see also Petersen & Abramowitz, supra note 9, at 369 (1995) (asserting waste facilities typically cost "tens of millions of dollars").

14. See Petersen & Abramowitz, supra note 9, at 370. Flow control is illustrated by the Harvey court as "a system in which waste haulers are licensed by the municipality and are directed to take the waste collected to the landfills that have been designated by the county." Harvey, 68 F.3d at 792; see also John Turner, The Flow Control of Solid Waste and The Commerce Clause: Carbone and Its Progeny, 7 Vill. Envtl. L.J. 203, 207 n.24 (1996) (citing National Economic Research Associates, The Cost of Flow Control at 2, 5 (May 3, 1995) (discussing flow control and its purposes)).

Flow control has been defined as:

[T]he ability of local governments to require that municipal solid waste generated within a jurisdiction be processed at a designated disposal site, transfer station, recycling facility or other waste processing facility. Flow control authority has been important to local government solid waste programs in part because it makes financing for capital facilities possible at affordable rates. Flow control authority has ensured investors and others that a particular facility will generate a sufficient level of waste disposal . . . to pay debt service bonds. With flow control authority, local governments have usually been able to obtain "investment grade" ratings from bond rating agencies, ensuring a reasonable cost of capital financing. Flow control has also been utilized in numerous jurisdictions to help ensure the sufficiency of revenue for facilities owned and operated by private companies.

Flow Control Measures, supra note 7, at 83 (statement of Micah S. Green, Executive Vice President, Public Securities Association).

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over the past few years, and many courts have invalidated them.\textsuperscript{15} In effect, municipalities have faced increasing uncertainty about how to manage their waste disposal problems.\textsuperscript{16}

In light of the solid waste disposal crisis, the importance of waste disposal and flow control jurisprudence is apparent. For instance, municipalities have created sizeable debt by issuing millions


\textsuperscript{15.} See, e.g., C & A Carbone, Inc. v. Town of Clarks-town, 511 U.S. 383 (1994)(invalidating flow control ordinance which required all trash produced within municipality pass through transfer station before being allowed out of town); Fort Gratiot, 504 U.S. at 367-68 (invalidating waste import restriction which said waste generated in another county, state or country could not be accepted absent explicit authorization by county plan); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)(invalidating state statute which prohibited most forms of waste from being imported from anywhere outside of state).

This judicial scrutiny was reflected by Mr. William Kovacs, an attorney at the Washington firm of Leller & Heckman, when he pointed out that flow control ordinances have been litigated for two decades. See generally Courts Might Settle Flow Control Issues Before Congress Can Pass Oxley Bill, [Nov. 2, 1995] 26 Solid Waste Rep. (Bus. Publishers, Inc.) No. 43, available in 1995 WL 8152510. Kovacs also stated that the controversy will persist because flow control ordinances will continue to be litigated in the future. See id. As a result, the validity of flow control has been deemed of monumental significance and an issue which affects the waste management industry more than any other issue. See id.

\textsuperscript{16.} See Teece, supra note 4, at 696. For example, RCRA encourages the type of solid waste planning that has been implemented by many states and municipalities. See Gabrysch, supra, note 6, at 589 (arguing Carbone ordinance was consistent with congressional objectives and should not have been declared unconstitutional). Recently, municipalities have become confused about how they should deal with waste disposal problems because, although their plans comply with RCRA’s objectives for solid waste management, the Supreme Court and other courts have held these ordinances invalid in cases like Carbone. See id. As a result, legal writers have attempted to negotiate the current confusion to recommend measures which would provide effective waste management without violating the Commerce Clause. See, e.g., Petersen & Abramowitz, supra note 9, at 395-407. Although there has been much speculation over what alternatives municipalities could pursue, four options have been suggested which some argue are “viable alternative methods that should withstand Commerce Clause challenges . . . .” Id. at 395.

For a discussion of the alternatives that have been suggested as available to municipalities, see infra notes 189-238 and accompanying text.
of dollars in bonds to finance the construction of waste facilities. The invalidation of flow control ordinances eliminates the vehicle by which municipalities had intended to satisfy their debts. As a result, the negative financial effects are felt by both the municipality and its residents through increased taxes. Additionally, invalidating the plans postpones environmentally sound waste disposal and exacerbates the waste disposal crisis. Consequently, negative

17. For a discussion of the debt incurred by Chester County, Pennsylvania, see infra note 89. For a discussion of the expenses associated with the construction and maintenance of waste facilities, see supra note 13 and accompanying text.

18. See Flow Control Act of 1994: Hearing on S. 2227 Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Environment and Public Works, 103d Cong. 85-87 (1994) [hereinafter Flow Control Act] (statement of Hon. Christopher Smith, U.S. Representative from the State of New Jersey). Congressman Smith stated that the invalidation of flow control measures through cases like Carbone force “[c]ounty taxpayers [to] face the prospect of additional taxes or reduced services to fulfill contract requirements for bonds already sold." Id. at 86. He continued to state that invalidation could have the effect of increased “disposal fees which would inevitably mean higher local property taxes." Id.

19. For example, the loss of flow control makes recycling efforts less likely to be successful. See Flow Control Act, supra note 18, at 2 (statement of Sen. Lautenberg); see also Recycling Law Turns 10, Amid Uncertainty, BERGEN RECORD, Apr. 30, 1997, at A-3 (stating “[a]nother potential threat to New Jersey recycling efforts is a federal court decision that says that states cannot force garbage haulers to dump their loads at county-run facilities . . .” and that “[w]e’ve only been able to achieve [the recycling rate] because it is subsidized by trash tipping fees and that will not be able to continue after deregulation.”) This, in turn, has two additional effects: (1) waste that could otherwise be recycled and removed from the waste stream unnecessarily occupies landfill space, thus increasing the demand for already decreasing landfill space, and (2) failure of recycling efforts increases environmental and health risks. See Flow Control Measures, supra note 7, at 44. (statement of James V. Sears, Director, Department of Solid Waste Management, Marion County, Oregon). Mr. Sears stated that:

The absence of flow control authority was a significant factor in the late 1994 closing of two Ohio waste management facilities - in Akron and Columbus. A directly related consequence of the shutdown of the Columbus facility is that 50,000 tons (annual amount) of various metals that had previously been recycled (by just that one facility) are now being put in a landfill - Columbus has been forced to terminate recycling of that huge volume of metals.

Id.

Similarly, in a statement to the House, a Joint Statement of the U.S. Conference of Mayors and the Municipal Waste Management Association revealed that “[a]s a result of a federal district court decision that [a] [c]ounty’s waste flow ordinance [was] unconstitutional, the [c]ounty has been unable to finance construction of a new 600-ton per day waste to energy facility and commercial materials recycling facility, necessary to meet the State-mandated reduction and recycling goals.” Waste Flow Control Hearing, supra note 9, at 225. In fact, it has been argued that flow control not only encourages recycling, but that it also has played an important part in the development of technological advances in recycling. See The Impact of Solid Waste Flow Control on Small Businesses and Commerce: Hearing Before the Comm. on Small Business, 104th Cong. 237 (1995) [hereinafter Impact of Solid Waste] (letter from the Local Government Coalition for Environmentally Sound Municipal Solid Waste Management).
health impacts are a very real threat. Therefore, as a practical effect, the judicial decisions in flow control cases are considerably important because of their impact on virtually every facet of our lives.

This Note analyzes the legal debate surrounding flow control ordinances and demonstrates that flow controlling waste is both a practical and constitutionally sound method of tackling the national waste crisis. Specifically, Part II examines important flow control jurisprudence by providing a framework for analyzing the constitutionality of any waste management or flow control ordinance. Part III presents the factual background and procedural history of *Harvey & Harvey, Inc. v. County of Chester*. Part IV analyzes the reasoning employed by the Third Circuit in deciding *Harvey*. Part V critically analyzes the Third Circuit’s holding, and suggests that the Chester and Mercer County flow control ordinances could have survived strict scrutiny and should have been declared constitutional. Finally, Part VI discusses the potential financial, environmental and social impacts of the *Harvey* decision.

II. BACKGROUND

A. The Commerce Clause

The Commerce Clause of the United States Constitution has been characterized as “one of the primary objects for which the people of America adopted their government.” Article I states that “Congress shall have power to . . . regulate Commerce . . . among the several States.” This grant of authority allows Congress to regulate “the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”

Although the Commerce Clause is cast as an affirmative grant of power to Congress, the Clause also implies that it limits the powers of the states, and thereby has given rise to the term “Dormant

20. The negative health and environmental consequences resulting from delayed or postponed recycling efforts are not the only negative effects of flow control invalidation. For a discussion of the negative impacts on recycling efforts stemming from flow control invalidation, see *supra* note 19 and accompanying text.

21. 68 F.3d 788 (3d Cir. 1995).

22. See Gibbons v. Ogden, 22 U.S. 1 (1824); see also Cook v. County of Marshall, 196 U.S. 261, 272 (1905) (stating that “[i]ndeed, it may be said that without [the Commerce Clause] the Constitution would not have been adopted.”).

23. U.S. CONST. art. I, § 8, cl. 3.

In essence, because the power to regulate interstate commerce has traditionally been interpreted as a grant of power to Congress, the Dormant Commerce Clause limits the

25. See id. at 236. Although there is no language or provision of the Constitution which explicitly prohibits states from regulating or burdening interstate commerce, such a prohibition has been read into the Commerce Clause. See Maine v. Taylor, 477 U.S. 131, 137 (1986) (quoting Lewis v. BT Inv. Managers, Inc. 447 U.S. 27, 35 (1980)). In an opinion written by Justice Blackmun, the Supreme Court recognized this by stating that “although the Clause thus speaks in terms of powers bestowed upon Congress, the Court has long recognized that it also limits the power of the States to erect barriers against interstate trade.” Id. (quoting Lewis, 447 U.S. at 35).

Writing for the Court in Gibbons, Justice Marshall noted “when a state proceeds to regulate commerce . . . among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do.” Gibbons, 22 U.S. at 199-200. He continued:

It has been contended by the counsel for the appellant that, as the word to “regulate” implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in this argument, and the court is not satisfied that it has been refuted.

Id. at 209.

Although the power to regulate commerce has been recognized as the province of the federal government, the clause has not been read as a complete bar to all state regulations affecting interstate commerce. See Cooley v. Board of Wardens, 53 U.S. 299 (1851). Justice Curtis established this point in Cooley, when he wrote:

The diversities of opinion, therefore, which have existed on [the subject of state power to regulate pursuant to the Commerce Clause] have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of [the Commerce] power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

Id. at 319.
state's authority to regulate interstate commerce. As Chief Justice Marshall wrote in *Gibbons v. Ogden*, Congress has the exclusive power to regulate commerce, and therefore, if Congress does not exercise this power, it must "lie dormant." 27

The purpose of the Commerce Clause was to give Congress the power to prevent the perceived evils of protectionist trade by the states. 28 Courts evaluate legislative acts to determine whether there

26. See *Gibbons*, 22 U.S. at 189; see also *South-Central Timber Dev. v. Wunnincke*, 467 U.S. 82, 87-88 (1984) (stating "[a]lthough the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce"); *Lewis*, 447 U.S. at 35; *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-38 (1949).

27. *Gibbons*, 22 U.S. at 189 (1824). In utilizing this exclusive commerce power, Congress has three options available to it. It can exercise it directly, as it did in *Gibbons*, by granting a ferry monopoly. See *id.* This form of commerce power is the most obvious positive grant of authority which is explicitly stated in the Constitution. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 401 (1994) (stating the Commerce Clause "empowers Congress to regulate interstate commerce"); *South-Central*, 467 U.S. at 87 (stating "the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce").

Alternatively, Congress can refrain from exercising any regulatory power at all, thereby requiring that specific areas of commerce lie dormant and unregulated by the states. See, e.g., *Carbone*, 511 U.S. at 402 (stating Court's prior decisions hold "[D]ormant Commerce Clause forbids States and their subdivisions from regulating interstate commerce").

Finally, Congress can expressly authorize the states to regulate an area of commerce that would, absent express authorization, be outside state regulatory powers. See *id.* at 401 (stating in "absence of Congressional action," states are barred from regulating interstate commerce); *South-Central*, 467 U.S. at 87-88 (stating that "Congress may 'redefine the distribution of power over interstate commerce' by 'permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible'") (quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945)).

28. See *Brown v. Maryland*, 12 U.S. 419, 445 (1827). Chief Justice Marshall observed that the Commerce Clause was adopted as a result of the experiences of the Confederacy when he wrote:

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of the nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress.
has been a Commerce Clause violation while keeping this purpose in mind. As a result, the judiciary has developed a two part test to determine whether an act violates the Commerce Clause.

Part one of the test asks whether the challenged act discriminates against interstate commerce either on its face or in its effect. If the challenging party can establish discrimination, part two of the test is triggered. This requires the state or political subdivision to prove that the statute serves a legitimate local purpose and that the purpose could not have been served "as well" by nondiscriminatory alternatives. If the court finds that the legitimate interest can

Id. at 445-46.

Justice Frankfurter reiterated Marshall's impressions when he wrote that the Commerce Clause "was an authorization to remove those commercial obstructions and harassments to which the militant new free states subjected one another, and to enable the community of the states to present a united commercial front to the world." Felix Frankfurter, The Commerce Clause Under Marshall, Taney and Waite 13 (1937); see generally Carbone, 511 U.S. 383 (1994). In Carbone, the Supreme Court annunciated the purpose of the Commerce Clause stating that, "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." Carbone, 511 U.S. at 390.

29. See Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 5-7 (1986). Even scholars who believe that there is little evidence to interpret the Commerce Clause agree that "[t]here does not appear to have been . . . 'any considerable (if, indeed, there was any) opposition to the grant of the [Commerce] power.' It was reported in the first draft of the Constitution exactly as it now stands . . ." Frederick H. Cole, The Commerce Clause of the Federal Constitution, 5-6 (Baker, Voorhis & Co. ed., 1908).


Discrimination has been defined as the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788, 797 (3d Cir. 1995) (quoting Oregon Waste Sys. Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994)).

32. See Maine, 477 U.S. at 138 (citing Hughes, 441 U.S. at 336); see also Harvey, 68 F.3d at 797. The Third Circuit reiterated the standard established by the Supreme Court when it wrote that "[i]f a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." Id. at 797 (emphasis added) (quoting Maine, 477 U.S. at 138).

33. See Harvey, 68 F.3d at 797 (stating that state party which proves there is legitimate local purpose has additional burden of establishing that "this purpose could not be served as well by available nondiscriminatory means") (emphasis added) (quoting Maine, 477 U.S. at 131) (citing Hughes, 441 U.S. at 336); see also Hunt, 432 U.S. at 353; Dean Milk, 340 U.S. at 354.
be achieved by a less discriminatory alternative, the act will be declared unconstitutional as discriminating against interstate commerce.\(^{34}\) Although part one of this test is applied to acts which discriminate both in effect or on their face, courts have employed it more often where an ordinance is facially discriminatory.\(^{35}\)

However, if the challenging party does not establish that the act is discriminatory, the court will apply a balancing test.\(^{36}\) Under

\(^{34}\) See Carbone, 511 U.S. at 391-92. The Carbone Court stated this principle when it wrote that "[d]iscrimination against interstate commerce . . . is per se invalid, [unless] the municipality can demonstrate . . . that it has no other means to advance a legitimate local interest." \textit{Id.} (emphasis added); see also Maine, 477 U.S. at 131 (holding as constitutional "Maine's ban on the importation of live baitfish because it serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives").

\(^{35}\) See generally Carbone, 511 U.S. 383 (applying discrimination test and holding as unconstitutional requirement that local waste be shipped to designated transfer station); Fort Gratiot, 594 U.S. 355 (applying discrimination test and holding that waste import restrictions unambiguously discriminate against interstate commerce and could not be distinguished from \textit{Philadelphia}); \textit{Philadelphia}, 437 U.S. 617 (holding ban on most forms of out of state waste discriminates both on its face and in effect); \textit{Dean Milk Co.}, 340 U.S. 349 (applying discrimination test and holding act is still discriminatory where in-state and out-of-state parties are both covered by prohibition).

\(^{36}\) See \textit{Pike}, 397 U.S. at 142. The Court announced that the general rule of the balancing test, although "variously stated," is: "Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." \textit{Id.} (citing Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960)). The Court continued, stating that "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." \textit{Id.} at 142.

In \textit{Pike}, the Court was asked to decide the constitutionality of a state statute which required Arizona grown produce to be packaged in-state. See \textit{id.} at 138-40. The law was enacted in "fear that some growers were shipping inferior or deceptively packaged produce, with the result that the reputation of Arizona growers generally was being tarnished and their financial return concomitantly reduced." \textit{Id.} at 143. The plaintiff was an Arizona cantaloupe grower who did not own packaging facilities in-state, but who shipped the goods to its nearby facility in California for packaging. See \textit{id.} at 139. This packaging bore the California name. See \textit{id.} Pursuant to the statute, Arizona sought to prohibit the plaintiff from exporting the products and to force the producer to comply with the law by packaging the goods in-state. See \textit{id.} at 139. The plaintiff alleged the law was burdensome because compliance would force the company to construct a new packaging facility within Arizona at an estimated cost of $200,000. See \textit{id.} at 140.

The Court found the statute imposed an unreasonable burden upon interstate commerce. See \textit{id.} at 146. Although the Court recognized that Arizona had a legitimate local interest in preserving the name of its produce by preventing deceptive packaging of inferior goods, it nevertheless determined that this purpose was not what motivated the state to enforce the law against the plaintiff. See \textit{id.} at 144. The Court found that Arizona was not acting to protect its name from being tarnished, but rather, because "[i]t [was] within Arizona's legitimate interest to require that interstate cantaloupe purchasers be informed that this high quality...
this test, commonly referred to as the *Pike* balancing test, an act will be deemed constitutional unless the burdens imposed by the act upon interstate commerce are "clearly excessive in relation to the putative local benefits." 37 This balancing test is applied by courts when an ordinance, although nondiscriminatory in nature, imposes unnecessary burdens on the flow of interstate commerce. 38

B. Commerce Clause Jurisprudence

Since the landmark Supreme Court decision of *C & A Carbone, Inc. v. Town of Clarkstown*, 39 the evolution of Commerce Clause jurisprudence has been divided into three categories: pre-*Carbone* jurisprudence, the *Carbone* case itself, and post-*Carbone* jurisprudence. Important decisions from these categories shape contemporary flow control cases.

1. *Pre-Carbone* Jurisprudence

*Pre-Carbone* jurisprudence finds its roots in *City of Philadelphia v. New Jersey*, 40 where the Supreme Court decided the constitutionality of a New Jersey law which prohibited the importation of most forms of out-of-state waste. 41 The state of New Jersey argued that its landfruit was grown in Arizona." *Id.* at 144. Therefore, the Court determined that Arizona was not worried about a tarnished name, but rather, wanted credit for its own products. *See id.* The Court pointed out that this is a less than a compelling interest standard. *See id.* at 146. The Court held these reputation interests to be insufficient when balanced against the burdens placed on the individual grower. *See id.*

As an example of where the balancing test has been used, the *Harvey* court cited *Minnesota v. Clover Leaf Creamery Co.* *See Harvey*, 63 F.3d at 797 (citing 449 U.S. 456 (1981)). In *Clover Leaf Creamery*, the Supreme Court determined that the statute in question did not discriminate on its face or in practical effect. *See id.* at 797. Rather, the Court applied the balancing test "[b]ecause the statute imposed burdens on both in-state and out-of-state [parties]." *Id.*


38. *See Harvey*, 68 F.3d at 797. For a discussion of the Court’s analysis and application of the balancing test in *Pike*, see *supra* note 36 and accompanying text.


41. *See id.* at 618. The law under review, chapter 363 of 1973 N.J. Laws, provided that:

No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

*Id.* at 618-19 (quoting N.J. STAT. ANN. § 13:11-10 (West Supp. 1978)).
fill capacities were inadequate to satisfy its needs, and that importation of out-of-state waste was negatively affecting its environment.\footnote{See id. at 625. These arguments were supported by legislative findings set forth in the state Act which provided: The Legislature finds and determines that . . . the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that the available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State, and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited. \textit{Id.} at 625.}

The Court held that the New Jersey law facially discriminated against out-of-state commerce by favoring local residents and therefore violated the Commerce Clause.\footnote{See id. at 628. The \textit{Philadelphia} Court determined that the New Jersey law, "[o]n its face . . . imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space" . . . and thus, fell "squarely within the area that the Commerce Clause puts off limits to state regulation." \textit{Id.}}

The Supreme Court reaffirmed \textit{Philadelphia} in \textit{Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources},\footnote{504 U.S. 353 (1992). In \textit{Fort Gratiot}, the Court was asked to decide the constitutionality of a Michigan law which provided that solid waste produced in another county, state, or country could not be accepted by a disposal facility unless the receiving county authorized the acceptance. \textit{See id.} Petitioner applied for and was denied an application from St. Clair County to receive out-of-state waste at its landfill. \textit{See id.} As a result of this denial, and the effect that the "statute . . . prevent[s] petitioner from receiving any solid waste that does not originate in St. Clair County," petitioner commenced this action challenging the validity of the Michigan law pursuant to the Commerce Clause. \textit{Id.}} when

\begin{itemize}
  \item The New Jersey Supreme Court accepted these statements of legislative purpose as well. \textit{See id.} at 625. The court was not, however, confined to these findings. The court went on to find "that New Jersey's existing landfill sites will be exhausted within a few years; that to go on using these sites or to develop new ones will take a heavy environmental toll, both from pollution and from loss of scarce open lands . . ." and that "the extension of the lifespan of existing landfills, resulting from the exclusion of out-of-state waste, may be of crucial importance in preventing further virgin wetlands or other undeveloped lands from being devoted to landfill purposes." \textit{Id.}
  \item In an oft cited passage, the Court summarized both the purpose of the Commerce Clause and its holding when it wrote:
      Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from the efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all. \textit{Id.} at 629.
\end{itemize}
it held that bans on the export or import of waste were invalid.\textsuperscript{45} In \textit{Fort Gratiot} the Court applied the reasoning of \textit{Philadelphia} and concluded that a Michigan law prohibiting the importation of out-of-state waste, absent congressional authorization, had the effect of allowing political subdivisions to "isolate [themselves] from the national economy."\textsuperscript{46} The challenged law in \textit{Fort Gratiot} was similar to the law that was challenged in \textit{Philadelphia} as it facially discriminated against out-of-state parties.\textsuperscript{47} The \textit{Fort Gratiot} Court concluded that the law was discriminatory. Because Michigan could not demonstrate that health and safety concerns could not have been served by nondiscriminatory alternatives, the law was declared unconstitutional.\textsuperscript{48}

The Court has also found that, like the export and import bans found unconstitutional in \textit{Philadelphia} and \textit{Fort Gratiot}, laws which charge increased rates on out-of-state waste are likewise facially dis-

\textsuperscript{45.} See id. at 355. The Court cited \textit{Philadelphia} as the framework which led to its determination that the Michigan law at issue was unconstitutional. See id.

\textsuperscript{46.} Id. at 361. The Court wrote that pursuant to the law's construction, all of Michigan's 83 counties could completely isolate themselves from competition by out-of-state parties. See id. The Michigan law under review stated in pertinent part: A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan. In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

\textsuperscript{47.} See \textit{Fort Gratiot}, 504 U.S. at 367. The Court found that, aside from the origin of the out-of-state waste, Michigan had not identified any other reasons why out-of-state waste should be treated differently from Michigan waste. See id. The Court concluded that the import bans "unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause." Id. at 367-68.

Michigan attempted to distinguish its law from New Jersey's, arguing that other counties located in Michigan were treated the same as out-of-state parties. See id. at 361-63. The Court stated that since each municipality was authorized to enact exclusion laws which would prohibit waste from entering its borders, the aggregate effect of all of these municipalities doing so would be no different than a single state law like that in \textit{Philadelphia}. See id. at 361 (holding that "our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself").

\textsuperscript{48.} See id. at 366. After a finding that a law is discriminatory, the burden then shifts to the state or political subdivision to prove that the purposes of the act could not have been served as well by available non-discriminatory alternatives. For a discussion of this test, see supra notes 32-33 and accompanying text.
Disparities in rates were at issue in both *Oregon Waste System, Inc. v. Department of Environmental Quality,* and *Chemical Waste Management, Inc. v. Hunt.* In these cases, the Court held the acts subject to the discrimination test and voided the provisions.

First, in *Oregon Waste,* the Oregon Legislature imposed an additional "surcharge" on the importation and disposal of out-of-state waste. In attempting to justify the surcharge, the state argued that the fee disparity was a "compensatory tax" designed to require out-of-state parties to pay their "fair share" of the "costs imposed on Oregon by the disposal of their waste in the State." The Court rejected this contention by holding that this argument could only be valid if the state could prove that, in the absence of the statute, out-of-state parties were being charged lower fees than in-state parties. Oregon also asserted that the law was a resource protection legislation. Neither state was able to meet the burdens imposed upon it by the discrimination test, specifically, each was unable to prove a legitimate local purpose for the different fees imposed on in-state and out-of-state parties. The Court found in both cases that there was no legitimate local concern and that less discriminatory alternatives were available to the state parties.

*Oregon Waste,* 511 U.S. at 94. The Act provided that the surcharge would apply to "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site." The Oregon Environmental Quality Commission set the out-of-state surcharge at $2.25 per ton as compared to the $0.85 per ton fee established by the legislature for in-state parties. The Court noted that it left open the possibility that a "fair share" argument could justify the imposition of discriminatory fees on out-of-state waste in *Chemical Waste.* (stating that "interstate commerce may be made to pay its way" (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977))).

*Oregon Waste,* 511 U.S. at 102. The Court noted that it left open the possibility that a "fair share" argument could justify the imposition of discriminatory fees on out-of-state waste in *Chemical Waste.* (stating that "interstate commerce may be made to pay its way" (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 281 (1977))).

*Oregon Waste,* 511 U.S. at 102-04. Included in this burden is the implicit idea that although a state can require interstate commerce to pay its fair share, it cannot "exact[ ] more than a just share' from interstate commerce." (citing Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734, 748 (1978)). To make the showing that a compensatory tax does not
measure, as it would discourage importation of out-of-state waste to conserve disposal space for in-state waste.\textsuperscript{56} The Court held that this justification was invalid as it was similar to the argument offered and rejected in \textit{Philadelphia}.\textsuperscript{57} Therefore, because the Court rejected both of Oregon's arguments that it had a legitimate local purpose for imposing the regulation, the state failed to meet its burden under the discrimination test and the act was declared unconstitutional.\textsuperscript{58}

In \textit{Chemical Waste}, the Alabama Legislature promulgated an act which imposed a greater fee on all hazardous waste that was both produced outside Alabama and disposed of inside Alabama.\textsuperscript{59} The Supreme Court found that this disparate fee structure was both discriminatory on its face, and in its effect; therefore, the state had the burden of establishing that it had a legitimate local purpose in creating the out-of-state fee, and that that purpose could not have

\textsuperscript{56} See \textit{Oregon Waste}, 511 U.S. at 102-04.

\textsuperscript{57} See \textit{id.} at 107. In fact, the Court did not recognize that the state's conservation argument was distinct from the state's first argument. \textit{See id.} It stated that Oregon's second argument was merely re-characterizing the first argument as resource protectionism. \textit{See id.} The Court continued to say that resource conservation is not a legitimate local purpose. \textit{See id.} It explained that "discouraging the flow of out-of-state waste into Oregon landfills... hardly advances respondents' cause... '[a] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.'" \textit{Id.} (citing \textit{Philadelphia}, 437 U.S. at 627).

\textsuperscript{58} See \textit{Oregon Waste}, 511 U.S. at 99. The Court summarized its reasons for rejecting the state's argument by focusing on the simple effects of the surcharge. \textit{See id.} The Court stated "that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other states. In making that geographical distinction, the surcharge patently discriminates against intrastate commerce." \textit{Id.} at 100.

\textsuperscript{59} See \textit{Chemical Waste}, 504 U.S. at 338. The Act provided that "[f]or waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of $72.00 per ton." \textit{Id.} at 338-39 (quoting ALA. CODE § 22-30B-2(b) (1990)).
been achieved through nondiscriminatory alternatives.\textsuperscript{60} Alabama asserted that its legitimate local concerns included protection of citizen health, conservation of the environment, and equalizing the financial burden by requiring that out-of-state parties pay their fair share of dumping waste within Alabama.\textsuperscript{61} Similar to its holding in Oregon Waste, the Chemical Waste Court rejected these arguments as non-legitimate local purposes.\textsuperscript{62} The Court further concluded that Alabama had numerous nondiscriminatory alternatives at its disposal, and thus, the fee structure violated the Commerce Clause.\textsuperscript{63}

\textsuperscript{60} See Chemical Waste, 504 U.S. at 342 (citing Hunt v. Washington Apple Adver. Comm’n, 432 U.S. 333, 353 (1977). The Court continued to state that the effect of determining that an act is discriminatory, at a minimum, is to subject it to “the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives.” Id. at 342-43 (citing Hughes v. Oklahoma, 441 U.S. 322, 337 (1979)).

\textsuperscript{61} See Chemical Waste, 504 U.S. at 343. The Alabama Supreme Court stated that the “legitimate local purposes” of the act were:

\begin{quote}
The Additional Fee serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state’s natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state’s highways, which flow creates a greater risk to the health and safety of the state’s citizens.
\end{quote}

Id.

\textsuperscript{62} See id. at 343-44. The Court said that Alabama had not offered more than rhetoric in its attempts to explain its legitimate local purposes for imposing the out-of-state fee. See id. at 343. In quoting the trial court, the Supreme Court noted that “[a]lthough the Legislature imposed an additional fee . . . on waste generated outside Alabama, there is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama.” Id. at 343-44. As a result, the Court concluded that the only reason that the fee was imposed was because of the origin of the waste. See id.

\textsuperscript{63} See id. at 344-46. The Court held that the concern of the State, that increased volumes of hazardous waste pose greater health hazards, could have been addressed by nondiscriminatory alternatives. See id. at 344-45. The alternatives listed were the imposition of per-ton fees on all hazardous waste, a per-mile fee imposed on all vehicles which transport hazardous waste on Alabama roads and a general cap on the amount of waste that the facility could accept from all sources. See id. at 345. Regarding Alabama’s allegation that the fee’s purpose was grounded in environmental and health concerns, the Court noted that these concerns do “not vary with the point of origin of the waste . . .” and that these concerns could have been achieved with increased regulation and monitoring of the transportation and disposal of waste. Id. at 345-46. As a result of these findings, the Court concluded that the fee was “an obvious effort to saddle those outside the State’ with most of the burden of slowing the flow of waste into the Emelle facility.” Id. at 346 (citing Philadelphia, 437 U.S. at 629).
2. C & A Carbone, Inc. v. Town of Clarkstown

In C & A Carbone, Inc. v. Town of Clarkstown, the Court determined the constitutionality of a flow control ordinance requiring waste to pass through a single designated transfer station. Clarkstown had contracted with a private party to construct the facility in return for Clarkstown’s promise to deliver 120,000 tons of waste, or to pay the equivalent amount of fees for that amount of waste. To ensure that the facility received the required tonnage to avoid having to make up the shortfall, Clarkstown passed the ordinance at issue which required all nonhazardous waste generated in, or passing through, the municipality to be shipped to the facility.

C & A Carbone, a local company which provided services similar to those provided by the designated facility, violated the ordinance when it bypassed the transfer station by sending waste to an out-of-state facility charging lower tipping fees. After Clarkstown learned about this action, it sued Carbone for violations of the ordinance, and sought to enjoin them from patronizing the non-designated facility.

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64. 511 U.S. 383 (1994).
65. See id. at 386. The ordinance required all nonhazardous waste, generated either within or outside the town, brought into the town to pass through the designated transfer station. See id. at 387. Upon receiving the waste, the facility would separate the recyclable waste from the non-recyclable waste. See id. The recyclable waste was forwarded to a recycling facility and the non-recyclable waste was sent to either a landfill or incinerator. See id. The Court held the ordinance unconstitutional because it “depriv[es] competitors, including out-of-state firms . . . access to a local market.” Id. at 386.
66. See id. at 387. The price to construct the transfer facility was $1.4 million. See id. The tipping fee that was established by the contractor to finance the costly facility was $81 per ton, well above the market rate for similar services. See id.
67. See id. Because of the high tipping fees, Clarkstown feared that it would not meet the guaranteed minimum tonnage if it relied solely on market forces to attract waste to the facility. See id. Due to the incentive of the municipality to avoid paying any difference between the promised amount and the actual delivered amount, Clarkstown created a mechanism to guarantee that waste would be delivered to the facility. See id. The result was the ordinance under review. See id. It required all nonhazardous waste within the municipality to be shipped to the designated transfer station. See id. at 388.
68. See id. at 388. Carbone maintained a facility in Clarkstown which separated recyclable from non-recyclable waste and prepared the wastes for subsequent shipping. See id. at 387-88. Therefore, the services rendered by Carbone were much like those rendered at the designated transfer station. See id. at 388. Although the ordinance allowed Carbone to continue receiving waste, it required it to ship the non-recyclable product of its sorting process to the designated facility to be sorted again. See id. The effect of this was to “require[ ] Carbone to pay a tipping fee on trash that Carbone has already sorted.” Id.
69. See Carbone, 511 U.S. at 388. Carbone responded by suing Clarkstown in federal court to enjoin the enforcement of the flow control ordinance. See id. The federal district court granted the injunction. See id. (citing C.A. Carbone, Inc. v.
In an opinion which has been criticized as broad and ambiguous, the Court invalidated the ordinance as a violation of the Commerce Clause.\(^{70}\) In sum, the Court concluded that the ordinance regulated interstate commerce\(^{71}\) and provided a benefit on a single in-state party.\(^{72}\) Additionally, the Court held that the legitimate purposes of the ordinance could have been achieved through alternative nondiscriminatory means.\(^{73}\)

Clarkstown, 770 F. Supp. 848 (S.D.N.Y. 1991)). The ordinance was later declared constitutional and Carbone was enjoined from violating the ordinance. See id. The appellate court found that the ordinance was not discriminatory and affirmed the district court's holding. See id. at 388-89. The New York Court of Appeals denied Carbone's appeal. See id.

70. For a discussion of the differing interpretations of the Carbone decision, see infra notes 74-80 & 174-75 and accompanying text.

71. See Carbone, 511 U.S. at 389-90. The Court rejected the town's argument that the ordinance was internal in scope only. See id. The Court held that "[w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." Id. at 389. The Court explained this holding in stating:

The Carbone facility in Clarkstown receives and processes waste from places other than Clarkstown, including from out of State. By requiring Carbone to send the nonrecyclable portion of this waste to the [designated] transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste. Furthermore, even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market.

Id. at 389.

72. See id. at 391-92. The Court held that "the flow control ordinance discriminates, for it allows only the favored operator to process waste within the limits of the town." Id. at 391. Further, the Court compared the ordinance under review to the acts that it had held invalid for imposing a benefit on in-state parties. See id. The Court stated the following about the flow control ordinance:

[It] hoards waste, and the demand to get rid of it, for the benefit of the preferred facility. The only conceivable distinction from the [cases cited] above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In Dean Milk, the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Id. at 392.

73. See id. at 393. Although the Court stated that "Clarkstown had any number of nondiscriminatory alternatives for addressing the health and environment problems alleged to justify the ordinance in question," only one was suggested, uniform safety regulations. Id.
3. Post-Carbone Jurisprudence

In light of the Carbone decision, subsequent flow control decisions have reflected varying interpretations of the scope of the holding.74 Courts have interpreted the scope of Carbone's reach with varying approaches. Many courts have adopted a broad interpretation of Carbone, thereby prohibiting flow control measures altogether.75 Other courts have adopted a narrower interpretation and have held that some flow control ordinances are still permissible.76 Because great difficulty exists in determining the precise

74. See, e.g., Grand Cent. Sanitation, Inc. v. City of Bethlehem, No. CIV.A.94-5928, 1994 WL 613674 (E.D. Pa. Nov. 2, 1994). In Grand Central, the district court denied the plaintiff’s motion for a preliminary injunction, in part, because of the district court’s confusion over how the Third Circuit would interpret Carbone. See id. at *3. When the court, in an opinion written by Judge Rendell, issued its decision in the Grand Central case, the Third Circuit was on the verge of determining the meaning of Carbone in Atlantic Coast Demolition & Recycling Inc. v. Board of Chosen Freeholders. See id. Judge Rendell denied the request for a preliminary injunction, in part, because of her belief that the Third Circuit’s decision in Atlantic Coast would have a large impact on the issues presented in Grand Central. See id.


The Senate Committee on Environmental and Public Works also expressed this same broad interpretation of Carbone when it stated that “the supreme [sic] Court’s ruling in the Carbone case has made it evidently clear that, absent Congressional action, the exercise of flow control by States and political subdivisions is unconstitutional.” S.Rep. No. 104-52, at 8 (1995) (general statement of the Committee on Environment and Public Works).

The U.S. Senate Democratic Policy Committee Legislative Bulletin similarly adopted a broad interpretation of Carbone when it summarized the purpose of Senate Bill 534, the Interstate Transportation of Municipal Solid Waste Act, as being “developed in response to the Supreme Court’s invalidation of State regulation of the interstate transportation of municipal solid waste.” U.S. Senate Democratic Policy Committee Legislative Bulletin (visited February, 1996) <http://www.senate.gov/~dpc/lb-11.html>.

holding of Carbone, courts have had divergent rulings when examining the constitutionality of flow control measures.

In general, courts construe Carbone's reach quite broadly.\textsuperscript{77} For example, one commentator cites the district court decision in Tri-County Industries, Inc. v. Pennsylvania Department of Environmental Resources as the high water mark for broad flow control holdings.\textsuperscript{78} Although the case was ultimately heard by the Third Circuit and remanded for reconsideration,\textsuperscript{79} the district court, having the benefit of Carbone, declared the ordinance discriminatory simply because the designated waste facility was located in-state.\textsuperscript{80}

The Third Circuit added to the lack of uniformity of Commerce Clause decisions in the Post-Carbone era in Harvey & Harvey, Inc. v. County of Chester.\textsuperscript{81} In Harvey, the Third Circuit was asked to decide the constitutional validity of two county ordinances which required local waste to be deposited at in-state sites.\textsuperscript{82} Rather than focusing on the challenged ordinances, as all courts had done in the past, the Harvey court examined the process by which the counties designated the waste facilities.\textsuperscript{83} This clear departure from traditional Commerce Clause analysis further reduced the uniformity in the evaluation of flow control acts in the Post-Carbone era. In Harvey, the Third Circuit decided two cases which were consolidated upon appeal.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{77} See Turner, supra note 14, at 220 (stating a broad interpretation of Carbone is “unmistakable judicial trend”); Petersen & Abramowitz, supra note 9, at 391 (stating that “courts are generally construing [Carbone] broadly, perhaps even more broadly than the Court anticipated”).
\item \textsuperscript{78} See Petersen & Abramowitz, supra note 9, at 391-92.
\item \textsuperscript{79} See Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995).
\item \textsuperscript{80} See Petersen & Abramowitz, supra note 9, at 391-92.
\item \textsuperscript{81} 68 F.3d 788 (3d Cir. 1995).
\item \textsuperscript{82} See id.
\item \textsuperscript{83} See id. For a discussion of other courts’ Commerce Clause inquiries, and the absence of an examination of the designation process, see supra notes 39-80 and accompanying text.
\item \textsuperscript{84} See Harvey, 68 F.3d at 791. Since both cases presented Commerce Clause challenges to similar flow control plans, the court joined the two cases and decided them in a single opinion. See id. After hearing oral arguments, the appellate court remanded both cases to their respective district courts. See id. The district courts were instructed to conduct additional fact finding before making conclusions of law not inconsistent with the Third Circuit’s decision. See id.
\end{itemize}

In Harvey, plaintiff sought a preliminary injunction to enjoin the enforcement of the Chester County regulations. See id. at 795. The court denied the motions because plaintiff did not adequately prove that it was suffering “immediate and irreparable harm.” Id. Before trial, the district court granted the defendant’s motion to apply the balancing test established in Pike. See id. The court reasoned that the Chester County Plan did not discriminate on its face, effect or purpose, and as a result, a strict scrutiny test was not appropriate. See id. Therefore, the Pike balancing test was the appropriate test for evaluating the plan’s validity under the
III. FACTS

A. The Chester County Case

In response to the daunting waste disposal problems and their associated environmental impacts, the Pennsylvania Legislature enacted the Municipal Waste Planning, Recycling and Waste Reduction Act of 1988 (Pennsylvania Act). The Pennsylvania Act requires long-term county waste planning and authorizes counties to adopt flow control ordinances. In response to the Pennsylvania Dormant Commerce Clause. See id. The plaintiff then conceded that it could not prevail under the Pike test. See id. For a discussion of discrimination and Pike balancing test, see supra notes 30-38 and accompanying text. In Tri-County Indus. v. County of Mercer, the district court held the Mercer County Plan unconstitutional on the grounds that the plan "operated to impermissibly burden interstate commerce" because it required "that all waste generated within the county be taken to the designated landfill in Butler County." Harvey, 68 F.3d at 796.

85. See PA. STAT. ANN. tit. 53, §§ 4000.101-4000.1904 (West Supp. 1997). The legislature promulgated the Pennsylvania Act to "[p]rotect the public health, safety and welfare from the short and long-term dangers of transportation, processing, treatment, storage and disposal of municipal waste." Id. § 4000.102(b)(3). The legislature declared that "[i]mproper municipal waste practices create public health hazards, environmental pollution and economic loss, and cause irreparable harm to the public health, safety and welfare." Id. § 4000.102(a)(1). The legislature also found that the problems of waste planning and disposal were so pervasive that "[v]irtually every county in this Commonwealth will have to replace existing municipal waste processing and disposal facilities over the next decade." Id. § 4000.102(a)(3). The legislature further determined that "[i]t is necessary to give the primary responsibility to plan for the processing and disposal of municipal waste generated within their boundaries to insure the timely development of needed processing and disposal facilities." Id. § 4000.102(a)(5). The declaration of policy and goals of the Act further reveal that:

Authorizing counties to control the flow of municipal waste is necessary, among other reasons, to guarantee the long-term economic viability of resource recovery facilities and municipal waste landfills to ensure that such facilities and landfills can be financed, to moderate the costs of such facilities and landfills over the long term, to protect existing capacity and to assist in the development of markets for recyclable materials by guaranteeing a steady flow of such materials.

Id. § 4000.102(a)(10). For a discussion of the problems which have plagued waste facilities and waste management plans, see supra notes 3-16 and accompanying text.

86. See id. § 4000.102(a)(2). The Act authorizes the counties to determine, for ten year intervals, which facilities will dispose and process their waste. See id. § 4000.303(e). It further requires counties to consider alternative plans and to provide assurances that the designation process was fair, open and competitive. See id. § 4000.502(f)(2). The Act does not require the designated facility to be located within the county or the state, but in-county sites should be given first choice. See id. § 4000.102(a)(6). The final site and its designation process are assembled into a municipal waste management plan which undergoes county, public and administrative scrutiny. See id. § 4000.502(f). During the formulation stages, a County Advisory Committee first reviews the management plan. See id. § 4000.503(a). The committee is comprised of "all classes of municipalities within the county, citizen organizations, industry, the private solid waste industry operating within the county, the private recycling or scrap metal processing industry operating within
Act, Chester County appointed the Chester County Act 101 Municipal Waste Advisory Committee (Committee) to evaluate potential service providers for their waste management system. In evaluating potential service providers, the Committee attended four waste disposal and processing facility site inspections both in and out-of-state.

The county is also required to re-submit any plan to the County Advisory Committee at least thirty days before it submits the plan to the Department of Environmental Resources (DER). The county must then make the plan available for a ninety day public review and comment period during which the county must hold at least one public hearing.

At this time the plan must be ratified by at least one half of the municipalities representing a minimum of fifty percent of the population. After submission, any party objecting to the plan may appeal to the Environmental Hearing Board.

Similarly, the Third Circuit stated that "as with Harvey, the flow control scheme in [the Tri-County] case also results from the interaction of Pennsylvania's Act 101 with the County's waste control plan and its implementing ordinances." 88

In discussing the Chester County case, the court stated: "We do not doubt that the county's legitimate intention to comply with the Act motivated its adoption of flow control." Harvey, 68 F.3d at 805. Additionally, the court wrote, "[t]here are indications that the state authority, the DER, was going to withhold approval of the plan unless it included flow control." Id. at 805, n.13.

Similarly, the Third Circuit stated that "[a]s with Harvey, the flow control scheme in [the Tri-County] case also results from the interaction of Pennsylvania's Act 101 with the County's waste control plan and its implementing ordinances." Id. at 808.

88. See Harvey, 68 F.3d at 794. The Committee evaluated sites during day-long presentations in Philadelphia, Chester County, Montgomery County, and York, Pennsylvania, as well as Baltimore, Maryland. See id. The committee also attended a presentation on the Westinghouse resource recovery facility in the City of Chester, Pennsylvania. See id.

Following these site visits, the Committee held thirteen publicly advertised meetings to evaluate the Chester County Plan. See id. These meetings were advertised in the Daily Local News, a paper with an approximate daily circulation of 45,000. See id. On May 29 and 31, 1990, the Committee held a public hearing to solicit comment on the proposed plan. See id. The record does not reveal the meetings' attendance or how it was advertised. See id. Further, the record is silent.
The final version of the ordinance established a comprehensive waste disposal plan which designated the Southeastern Chester County Refuse Authority Sanitary Landfill (SECCRA), the Chester County Solid Waste Authority Lanchester Sanitary Landfill (Lanchester) and the Pottstown Landfill (Pottstown), as the primary facilities to serve Chester County. The plan further divided the County into two service areas, each area being serviced by one of the primary sites. It provided that waste originating within those service areas had to be disposed of at the respective site. Both the plan and Department of Environmental Regulations (DER) guidelines provided for an amendment and revision process. Neither the plan nor the regulations contained language prohibiting out-of-state facilities from participating in the application process or from being designated as a disposal site. The County, however, stated as to why Harvey did not participate in the process. See id. Additionally, Harvey did not have any business in the area before 1990. See id. After making revisions in response to public debate, the Commission adopted a plan on September 25, 1990, which did not mandate flow control. See id. However, DER notified Chester County that it would not approve the plan unless it adopted a flow control element within the ordinance. See id. In response to DER's demand, Chester County added a flow control element to its waste plan and DER granted final approval on April 11, 1991.

89. See id. These sites were selected over other sites because “the haulers of trash in the County had established a historic pattern of disposal at these landfills.” Id. The County had a financial interest in the Lanchester site. See id. The Lanchester site was purchased with $42.55 million in Authority bonds guaranteed by Chester County. See id. The county later “guaranteed an additional $41.5 million in Authority debt, secured a $9.2 million letter of credit and agreed to provide the Authority with an additional $9.5 million for landfill projects.” Id.

90. See id. at 794-95.

91. See Chester County, Pa., Chester County Flow Control Ordinance No. 92-1 (Sept. 25, 1990). Specifically, § 7(a) of Chester County Flow Control Ordinance No. 92-1 states: “The County may, from time to time, establish Service Areas by resolution in accordance with the plan and any amendments thereto.” Id. Pennsylvania’s regulations provide that “[a] county with an approved municipal waste management plan may submit a revised plan to the Department in accordance with this subchapter at any . . . time.” 25 Pa. Code § 272.251(b) (1997).

92. See Harvey, 68 F.3d at 795. The court noted that “[t]he terms of the ordinance permit amendment to designate other facilities and do not prohibit out-of-state facilities from applying.” Id. In an accompanying footnote, the court highlighted the definition of a “designated facility” as presented in the ordinance. Id. at 795 n.7. The Ordinance defined a designated facility as follows:

The Lanchester Sanitary Landfill owned and operated by the Chester County Solid Waste Authority, located in Honeybrook Township, Chester County and Caernarvon and Salisbury Townships, Lancaster County; the Southeastern Chester County Refuse Authority Sanitary Landfill, located in London Grove Township, Chester County; the Pottstown Landfill owned and operated by SCA Services of Pennsylvania, Inc., located in West Pottsgrove Township, Montgomery County; or any other County designated Municipal Waste Processing or disposal facility.

Id. (emphasis added).
that any landfill that would withdraw revenue from the Lanchester Site would be opposed.\textsuperscript{93}

In response to the Chester County Plan, Harvey & Harvey, Inc. (Harvey), a Delaware corporation, filed suit against Chester County challenging the constitutionality of the flow control ordinance pursuant to the Commerce Clause.\textsuperscript{94} Harvey alleged that "the regulations isolate the County from the interstate solid waste market by prohibiting the export of locally generated waste to out-of-state disposal and by similarly prohibiting the import of waste processing and disposal services from out-of-state."\textsuperscript{95}

The district court concluded that Chester County’s ordinance did "not discriminate on its face nor [was] the primary purpose or effect’ to discriminate."\textsuperscript{96} After determining there was no discrimination, the district court concluded that the \textit{Pike} balancing test should also be applied.\textsuperscript{97} Harvey acknowledged that it could not meet its burden under this test.\textsuperscript{98}

B. The Mercer County Case

In the second of the two combined cases, Mercer County adopted an ordinance which designated only one facility to fulfill its waste disposal and processing needs.\textsuperscript{99} In determining which service provider would be awarded the contract, Mercer County developed specifications which it advertised nationwide, resulting in twenty-three parties requesting proposal application materials.\textsuperscript{100} After the application and bidding process was complete, Waste Management of Pennsylvania, which managed a landfill in Butler County, Pennsylvania, was awarded the Mercer County contract.\textsuperscript{101}

\textsuperscript{93} See id. at 795.
\textsuperscript{94} See id.; see also U.S. CONST. art. I, § 8, cl. 3. For a discussion of the Commerce Clause, see supra notes 22-38 and accompanying text.
\textsuperscript{95} Harvey, 68 F.3d at 795.
\textsuperscript{96} Id. at 803.
\textsuperscript{97} Id. at 791. For a discussion of the tests used to determine whether a law violates the Commerce Clause, see supra notes 30-38 and accompanying text.
\textsuperscript{98} See Harvey, 68 F.3d at 791.
\textsuperscript{99} See id. at 807. The designated site, was not located within Mercer County, but was located in Pennsylvania. See id.
\textsuperscript{100} See id. at 808. Parties submitted applications from Pennsylvania, Ohio, New York, Maryland, New Jersey, Minnesota, and Louisiana. See id.
\textsuperscript{101} See id. at 795. All of the companies that submitted final bids for the contract maintained facilities in Pennsylvania. See id. at 808. Additionally, none of the out-of-state parties which requested proposal packages actually submitted a bid. See id. The Third Circuit questioned the high attrition rate for out-of-state submissions and suggested that this attrition might possibly have been caused by elements of the designation process which discouraged out-of-state parties. See id. (stating although designation process appeared to be fair, "on remand Tri-County may be
The Mercer ordinance provided that the landfill designated in the county plan may be amended by the county waste authority.\textsuperscript{102}

The Mercer Ordinance required that all waste generated within its borders was to be hauled to the designated site in Butler County.\textsuperscript{103} The Ordinance also mandated that haulers obtain a license to haul waste within the county.\textsuperscript{104} Further, the ordinance imposed penalties against haulers who dumped waste in any facility not specified in the county plan.\textsuperscript{105}

Tri-County Industries, Inc. (Tri-County), was a Pennsylvania corporation licensed to haul waste for Mercer County.\textsuperscript{106} Although the county plan required haulers to transport waste only to the Butler site, Tri-County deposited some of its waste in Ohio facilities charging lower tipping fees.\textsuperscript{107} As a result, the Mercer County Solid Waste Authority notified Tri-County that a license revocation hearing was being held for Tri-County's failure to comply with the Mercer ordinance.\textsuperscript{108} Tri-County responded by filing an action for declaratory relief, seeking to establish that the Mercer ordinance violated the Commerce Clause.\textsuperscript{109}

The district court concluded that the Mercer ordinance was discriminatory, thus subjecting the ordinance to strict scrutiny.\textsuperscript{110} The district court concluded that the plan was impermissible because it impeded interstate commerce and was therefore in violation of the Commerce Clause.\textsuperscript{111}

\begin{footnotes}
\item[102] See id. at 809 n.18. The ordinance stated: "All Municipal Waste shall be transported to and delivered to the Facility designated by MCSWA [Mercer County Solid Waste Authority] from time to time . . . ." Id.
\item[103] See Harvey, 68 F.3d at 796.
\item[104] See id.
\item[105] See id. at 796. Specifically, the penalty threatened to be imposed on Tri-County for noncompliance was license revocation. See id.
\item[106] See id. at 795.
\item[107] See id. at 796. Approximately 500 tons of the 600 to 900 tons that Tri-County hauled per month were dumped at the alternative non-designated Ohio facilities. See id. The Butler facility charged a tipping fee of $35.00 per ton whereas the Ohio tipping fee ranged from $17.20 to $27.95 per ton. See id.
\item[108] See Harvey, 68 F.3d at 796.
\item[109] See id. at 796. In addition to raising alleged Commerce Clause violations, Tri-County requested a permanent injunction against Mercer County to preclude the enforcement of the threatened license revocation. See id.
\item[110] See id. at 796.
\item[111] See id. at 796, 807. The district court held that, "[i]t is the designation of a single, in-state landfill, rather than the process by which it was designated, that has resulted in the discrimination against interstate commerce." Id. at 807.
\end{footnotes}
IV. NARRATIVE ANALYSIS

A. Constitutionality of A Flow Control Ordinance Depends on the Fairness of the Designation Process

The Third Circuit analyzed general Commerce Clause jurisprudence before specifically evaluating the Chester County and Mercer County cases. After reviewing the Supreme Court's holding in Carbone, its own precedent in Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders, and other circuit court holdings, the Third Circuit derived a general summary of the applicable principles governing the constitutionality of flow control plans.

Based on those cases, the Third Circuit reasoned that the most appropriate method for determining whether a violation of the Commerce Clause had occurred was to focus on the process which the municipality employed in selecting a particular waste service provider. Additionally, the court defined the requisite burdens of proof and clarified the legal standards necessary to test the constitutionality of the Chester and Mercer ordinances.

112. See id. at 796-98. The Third Circuit first enunciated the general purpose and applicability of the Commerce Clause as interpreted by the Supreme Court. See id. at 798-800. "[T]he Commerce Clause is designed to eliminate protectionist restrictions on interstate trade which typically characterize international trade, such as embargoes, quotas, and tariffs." Id. at 797 (quoting Norfolk S. Corp., v. Oberly, 822 F.2d 388, 399 (3d Cir. 1987)).

113. For a discussion of C & A Carbone, Inc. v. Town of Clarkstown, see supra notes 64-73 and accompanying text.

114. 48 F.3d 701 (3d Cir. 1995).

115. See Harvey, 68 F.3d at 798-802.

116. See id. at 801-03. The court asserted that a local act is invalid where it categorically or facially discriminates. See id. at 801. The court noted that where discrimination is not obvious, three factors should be considered in determining a plan's constitutional validity. See id. Specifically, the court wrote:

To determine whether these flow control schemes actually discriminate against interstate commerce (triggering strict scrutiny analysis) the court must closely examine: (1) the designation process; (2) the duration of the designation; (3) the likelihood of an amendment to add alternative sites, for signs that out-of-state bidders do not in practice enjoy equal access to the local market.

117. See id. at 802-03. The court stated that the burden of proving that an act discriminates against interstate commerce rests on the challenging party. See id. at 802 (citing Hughes, 441 U.S. at 336). For the challenging party to meet its initial burden, he must establish that the designation process favors in-state parties in either purpose or effect. See Harvey, 68 F.3d at 802. Purposeful or effective discrimination can be shown with "direct evidence of favoritism," like corrupt payments, evidence that a designation was given because the county or municipality sought to protect one of its own investments, or excessively long contracts that designate in-state parties as service providers. See id.

If the challenging party meets its burden of proof, the state can then rebut the evidence with a showing that the "designation process was open, fair, and competi-

http://digitalcommons.law.villanova.edu/elj/vol9/iss1/6
then applied those principles to the Chester and Mercer County ordinances.

1. The Chester County Case

The Third Circuit determined that the district court erred in applying the *Pike* balancing test to the *Chester County* case. The Third Circuit found that the discrimination test was the proper level of scrutiny to be applied to the Chester Ordinance, and thus, the Third Circuit reversed the district court's decision holding that the process of selecting and amending the county plan was not sufficiently fair. The case was remanded for application of the correct law, consistent with the Third Circuit's decision.

After determining that the district court committed reversible error, the Third Circuit discussed the arguments presented by Harvey, the waste hauler. Harvey's first argument alleged that the entire flow control scheme was facially discriminatory because it only named the in-state SEECRA, Lanchester and Pottstown sites. The court rejected this argument, stating that local governments have the authority to contract with a limited number of businesses, and therefore, the designation of three facilities in the Chester

ative, i.e., determined by objective criteria which do not have the effect of favoring in-state interests." *Id.* at 802-03. Consideration of the fairness of the process should include, but is not limited to, "solicitation, selection criteria, evaluation of bidders..." *Id.* at 803.

If the state cannot meet this burden, it must then overcome the strict scrutiny burden. *See id.* Under strict scrutiny, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986)).

118. *See id.* at 809-09. The Third Circuit wrote that the district court misunderstood the tests which the ordinance must pass. *See id.* at 803. The Third Circuit stated that "[i]n granting judgment for Chester County, the district court determined that the Ordinance 'does not discriminate on its face nor is the primary purpose or effect' to discriminate. The court, however, demanded too much, for in order to find a [D]ormant Commerce Clause violation there is no requirement that discrimination must be the 'primary' purpose or effect." *Id.* The Third Circuit determined that this error was enough to warrant setting aside the lower court's determination. *See id.*

The Third Circuit further held that the balancing test may have been applied in error because there was strong evidence that the act was discriminatory. *See id.* This determination was made due to the county's designation process which appeared to be closed to out-of-state parties. *See id.* The court held that the lower court ignored evidence regarding the designation process which would likely have required an examination of the Chester Ordinance under the discrimination test. *See id.*

119. *See id.* at 807.
120. *See Harvey*, 68 F.3d at 807.
121. *See id.* at 803.
County plan was not facially discriminatory. The court continued to reason that such an argument "would require a local government to select out-of-state sites, irrespective of their merits, in order to withstand Commerce Clause scrutiny." 

Harvey's second argument alleged that the Chester County ordinance resembled export/import bans which have been subjected to repeated invalidation by many circuit courts and the Supreme Court. The court disposed of this argument stating that, unlike here, the precedent invalidating export/import ordinances explicitly bans out-of-state interests from participating in the local market.

After dismissing Harvey's arguments, the court stated that the Chester ordinance could be deemed unconstitutional if either the Pennsylvania Act or the Chester County Act 101 Municipal Waste Management Plan favored in-state parties. The court then evaluated the Pennsylvania Act and the Chester ordinance to determine whether the county had violated the Commerce Clause. More specifically, the Third Circuit examined the Chester County plan's designation and amendment processes as well as the economic motivations that the county may have had when selecting the in-state sites.

In analyzing the Pennsylvania Act, the court noted that flow control measures were only authorized, not required. The court discovered that the Pennsylvania Act contained elements which in-

122. See id. The court likened this authority to the power of a municipality in the public utility context. See id. A municipality, pursuant to its police powers, may designate monopolistic contracts to service the locality. See id. This view is further bolstered by the fact that police powers are at their "strongest in the health and safety area." See id.

123. See id. at 804.

124. See id. at 804.

125. See Harvey, 68 F.3d at 804.

126. See id. at 804. In distinguishing the present case from those that explicitly banned out-of-state interests, the court clarified that it was not suggesting that explicit or facial discrimination was the only type of discrimination which is unconstitutional. See id. The court reiterated its opinion that, in addition to a showing of facial discrimination, a showing of discriminatory effect is enough to trigger strict scrutiny under the discrimination test. See id.

127. See id. at 793-95, 804.

128. See id. at 805-07. For a discussion of the court's analysis of Chester County's designation process, see infra notes 136-39 and accompanying text. For a discussion of the court's analysis of Chester County's amendment process, see infra notes 140-42 and accompanying text. For a discussion of the potential economic motives that Chester County had in designating the waste sites, see infra notes 143-48 and accompanying text.

129. See id. at 804 (citing Pa. Stat. Ann. tit. 53, §§ 4000.303(a)-(e) (West Supp. 1997)). This section defined the "[p]owers and duties of counties" as:
dicated the need for a fair and open process in determining waste sites, while requiring the county to give preferential status to disposal sites within the county.\(^{130}\) Although the Third Circuit ultimately

\(\text{(a) Primary responsibility of county. — Each county shall have the power and its duty shall be to insure the availability of adequate permitted processing and disposal capacity for the municipal waste which is generated within its boundaries. As part of this power, a county:}

\begin{enumerate}
\item May require all persons to obtain licenses to collect and transport municipal waste subject to the plan to a municipal waste processing or disposal facility designated pursuant to subsection (e).
\item Shall have the power and duty to implement its approved plan, including a plan approved under section 501 (b), as it relates to the processing and disposal of municipal waste generated within its boundaries.
\item May plan for the processing and disposal of municipal waste generated outside its boundaries and to implement its approved plan as it relates to the processing and disposal of such waste.
\item May adopt ordinances, resolutions, regulations and standards for the recycling of municipal waste or source-separated recyclable material . . . .
\item May prohibit the siting of additional resource recovery facilities within its geographic boundaries where any additional resource recovery facility is inconsistent with the county plan . . . .
\end{enumerate}

\(\text{(b) Joint planning. — Any two or more counties may adopt and implement a single municipal waste management plan for the municipal waste generated within the combined area of the counties.}

\(\text{(c) Ordinances and resolutions. — In carrying out its duties under this section, a county may adopt ordinances, resolutions, regulations and standards for the processing and disposal of municipal waste, which shall not be less stringent than, and not in violation of or inconsistent with, the provisions and purposes of the Solid Waste Management Act, this act and the regulations promulgated pursuant thereto.}

\(\text{(d) Delegation of county responsibility. — A county may enter into a written agreement with another person pursuant to which the person undertakes to fulfill some or all of the county's responsibilities under this act for municipal waste planning and implementation of the approved county plan . . . .}

\(\text{(e) Designated sites. — A county with an approved municipal waste management plan that was submitted pursuant to section 501(a), (b) or (c) is also authorized to require that all municipal wastes generated within its boundaries shall be processed or disposed at a designated processing or disposal facility that is contained in the approved plan and permitted by the department under the Solid Waste Management Act . . . .}

\text{PA. STAT. ANN. tit. 53, §§ 4000.303(a)-(e).}

\(^{130}\) See Harvey, 68 F.3d at 804. Specifically, the court cited sections of the plan stating:

\text{If the plan indicates that additional processing or disposal capacity is needed by the county, the county shall give public notice of such a determination and solicit proposals and recommendations regarding facilities and programs to provide such capacity. The county shall provide a copy of such notice to the department, which shall cause a copy of such notice to be published in the Pennsylvania Bulletin. . . . .}
determined there was evidence that the Pennsylvania Act favored in-state interests, the court noted that Harvey had not yet met its burden.\footnote{131} Instead, the court proceeded to examine the Chester ordinance while remaining conscious of its earlier findings.\footnote{132}

Next, the Third Circuit scrutinized the Chester ordinance to determine whether the county favored in-state sites through the plan's implementation.\footnote{133} The court noted that "[e]stablishing dis-

Describe alternative facilities or programs, including, but not limited to, waste reduction, recycling, or resource recovery facilities or programs, that were considered and provide reasonable assurances that the county utilized a fair, open and competitive process for selecting such facilities or programs from among alternatives which were suggested to the county.

Review and comment. — Prior to adoption by the governing body of the county, the county shall submit copies of the proposed plan for review and comment to the department, all municipalities within the county, all areawide planning agencies and the county health department, if one exists. The county shall also make the proposed plan available for public review and comment. The period for review and comment shall be 90 days. The county shall hold at least one public hearing on the proposed plan during this period. The plan subsequently submitted to the governing body of the county for adoption shall be accompanied by a document containing written responses to comments made during the comment period.

\text{PA. STAT. ANN. tit. 53, §§ 4000.502-4000.503.}

Additionally, the county was required to favor in-county sites. \text{See Harvey, 68 F.3d at 804.} Pennsylvania law stated that "[p]roper and adequate processing and disposal of municipal waste generated within a county requires the generating county to give first choice to new processing and disposal sites located within that county." \text{PA. STAT. ANN. tit. 53, § 4000.102(6).} Similarly, the court noted language of the Act which stated that:

The plan shall identify the general location within a county where each municipal waste processing or disposal facility and each recycling program identified in subsection (f) will be located, and either identify the site of each facility if the site has already been chosen or explain how the site will be chosen. For any facility that is proposed to be located outside the county, the plan shall explain in detail the reasons for selecting such a facility.

\text{Id.} § 4000.502(g). Regarding these provisions, the court stated that "[b]y imposing an incremental administrative burden on counties attempting to designate a facility outside its borders, these provisions clearly express a preference that counties use sites within their borders." \text{See Harvey, 68 F.3d at 804.}

\footnote{131}{See Harvey, 68 F.3d at 810. The court pointed out that Harvey did not attack the Pennsylvania Act directly and did not rely on the passages indicating in-state favoritism in making its case. \text{See id.} at 804.}

\footnote{132}{See id. The court concluded that even though Harvey did not rely on the provisions of the Pennsylvania Act when attempting to allege discrimination, a finding that the Act tended to prove discrimination did not end the inquiry. \text{See id.} Rather, the court simply kept the provisions tending to favor in-state parties in mind as it evaluated Harvey's arguments as to why the ordinance was discriminatory. \text{See id.}}

\footnote{133}{See id. at 805. The Third Circuit stated that the designation process was important in determining the ordinance's constitutional validity. \text{See id.} If the}
crimination requires only a demonstration that out-of-state interests did not compete for designation on a level playing field." Therefore, if the ordinance were unfair to out-of-county parties, legitimate environmental concerns would not shield the ordinance from invalidation.

The court initially focused on the designation process, reasoning that, if the county never considered any out-of-state landfills, as Harvey contended, the ordinance would be deemed discriminatory. In evaluating the legitimacy of this allegation, the court noted evidence that suggested that Chester County did consider both a Baltimore, Maryland and a Philadelphia, Pennsylvania site.

The court then expressed concern over both the advertisements of the meetings and the selection of the sites. The court noted that the public meetings were insufficiently advertised because the one local newspaper chosen to advertise the meetings had a relatively small circulation. The court also expressed concern over the sites which were eventually selected. The selected sites were the same in-state sites which were already the "primary disposal sites for the county's waste." Additionally, the court noted designation process favored in-county parties, then the ordinance "has the effect of discriminating against interstate commerce" and would be "subject to the strict scrutiny test enunciated in Taylor and Philadelphia." The court noted that, based on provisions of the plan, Chester County appeared to favor in-county interests. See id. The court also found that the county's economic interest in selecting the designated sites and the legislative history suggested the absence of a "level playing field." Id. For a discussion of the potential economic motives that Chester County had in designating the waste sites, see infra notes 143-48 and accompanying text.

134. Harvey, 68 F.3d at 805.
135. See id.
136. See id. Harvey not only alleged that out-of-state parties were never considered, but, that such parties were not permitted to submit bids for the designation contract. See id. The court stated that if these allegations were accurate, they would "establish that out-of-state sites did not compete on a 'level playing field' and that the process had the effect of discriminating against interstate commerce." Id.

137. See id. Although the Third Circuit found that consideration of the out-of-state sites seemed to disprove the allegations made by Harvey, the court did not go so far as to hold that a level playing field for out-of-state parties had been established. See id. at 805 n.15. Instead, the court stated that "[i]t is not clear whether the Committee actually considered designating . . . [the out-of-state] sites or whether it was simply investigating an alternative method of waste disposal. If the Committee never considered designating those sites, that would increase the impression that the process favored the in-state facilities." Id.

138. Id. at 805-06. In addition to the 13 poorly publicized Committee meetings, two additional public hearings were held to discuss the draft plan. See id. The court stated, however, that there was no evidence tending to show "that those meetings were any better publicized." Id. at 806.
that "[t]he Pottstown facility was designated as an alternate location only after the process was concluded." 139

Thereafter, the court looked at whether the ordinance provided for an amendment process which would allow additional sites. 140 The court concluded that, although such a process did exist, it was "quite constrained." 141 The court further noted that, even if an amendment process were available, the plan implied that the county did not intend to allow any alterations to the existing plan through the designation of additional sites. 142

Finally, the court examined the county's financial interests in designating the chosen sites. 143 The circuit court suspected that

Regardless of the inadequacy of the publicity surrounding the meetings, the court stated that on remand, the county could rebut the impression that they did not adequately publicize the meetings by establishing that the relevant parties were privy to the meeting information. See id. at 806 n.16. The court noted that demonstrating that the relevant parties were aware of the information could be established through a showing that "word of such proposals travels quickly through the trade grapevine" or that the publication was a "specialized trade journal." Id.

139. See Harvey, 68 F.3d at 806. In light of these factors, the court concluded that:

Two factors in particular create the impression that parochialism rather than competition determined the outcome of the designation process: (1) that established local businesses won the designation; and (2) that the Pottstown site was designated as an alternative after the process had concluded - a status that appears to have been specially created for this situation.

140. See id.

141. Id. The court stated, "additional sites can only be designated if the existing facilities have insufficient capacity, are unable to obtain expansion permits, develop unforeseen environmental problems which preclude continued use of those facilities, or are subject to regulatory changes which affect their capacity or preclude their continued use." Id. The court found that the possibility of amendment under this process did not equalize the unavailability of opportunities for out-of-state businesses. See id.

142. See id. The Committee indicated that it had no intention of an amendment to allow for additional facilities. See id. In a letter to DER, one Committee member openly expressed that the county did not want to designate additional facilities. See id. Additionally, the county had "covenanted" not to "build or operate" any additional facilities in a bond indenture that it had entered into in 1990. Id.

143. See id. In a footnote regarding how financial interests may have influenced the Chester County designation process, the court wrote:

Although the county's pre-existing economic interest in the designated landfill creates the incentive for the county to favor these in-state sites in violation of the Dormant Commerce Clause, not every case where the county has an economic stake in the designated site will result in such a violation. The county could, for example, have selected the designated sites in an open, fair and competitive process, and then made investments in improving those sites. The length of the period of the designation would, of course, have to be related to the amount of the investment.

Id. at 805 n.14.
the flow control ordinance was motivated by a need to compensate for the significant investment the county made in the Lanchester Landfill.\textsuperscript{144} The court also noted that the county's guarantee not to build or operate additional facilities was further proof that the financial motivations of the county may have been an important factor for favoring the in-state sites.\textsuperscript{145}

In light of these factors, the court stated that "[t]he need to protect the county's financial interests thus appears to have played a role in the county's decision to adopt flow control."\textsuperscript{146} The court compared this financial motivation to that of Clarkstown in \textit{Carbone},\textsuperscript{147} in which the Supreme Court invalidated a flow control ordinance on similar grounds.\textsuperscript{148}

In conclusion, the Third Circuit stated that, although there was some evidence of an open and fair process, "it appear[ed] that Chester County's designation process did not afford other sites, including out-of-state sites, a level playing field."\textsuperscript{149} The court ultimately determined that the flow control ordinance may have been discriminatory and remanded the case to the district court for further consideration.\textsuperscript{150}

\begin{itemize}
\item \textsuperscript{144} See \textit{Harvey}, 68 F.3d at 806. The court indicated that the economic motive was of no less importance simply because the debt associated with the Lanchester facility was incurred before the adoption of the flow control ordinance. \textit{See id.} The court was aware that the County bought the Lanchester facility with $42.55 million in bonds, guaranteed an additional $41.5 million in county debt and agreed to provide an additional $9.5 million to finance additional landfill projects. \textit{See id.}

The effectiveness of paying down county debt by designating the facilities as those to be patronized also suggested to the court that economic concerns were a motivating factor. \textit{See id.} For example, the designation of the sites in the ordinances provided the county with the opportunity "to charge 200\% to 300\% of the prevailing tipping fees at alternative sites." \textit{Id.} at 806. The SEECRA site charged $52.00 per ton, Lanchester charged $57.00 per ton, while an alternative landfill in Baltimore only charged $34.00 per ton. \textit{See id.} at 806-07.

\item \textsuperscript{145} \textit{See id.} at 807.

\item \textsuperscript{146} \textit{Id.}

\item \textsuperscript{147} \textit{See id.} For a discussion of the financial motivations of Clarkstown in \textit{Carbone}, see \textit{supra} note 67 and accompanying text.

\item \textsuperscript{148} See \textit{Harvey}, 68 F.3d at 807. The court analogized that "[i]n this respect, the case closely resembles \textit{Carbone}, where the Supreme Court found discriminatory Clarkstown's 'avowed purpose . . . [of] retain[ing] the processing fees charged at the transfer station to amortize the costs of the facility.'" \textit{Id.}

\item \textsuperscript{149} \textit{Id.} at 807.

\item \textsuperscript{150} \textit{See id.} Although the Third Circuit concluded that the Chester ordinance appeared to impose discriminatory effects on interstate commerce, the court did not hold the Chester ordinance unconstitutional. \textit{See id.} Instead, the court remanded the case knowing that the district court did not have the benefit of the Third Circuit's holding in \textit{Atlantic Coast Demolition & Recycling v. Board of Chosen Freeholders}, when it first considered the ordinance's constitutionality. \textit{See id.}
\end{itemize}
2. The Mercer County Case

Similar to its reasoning in regard to the Chester ordinance, the Third Circuit concluded that the district court's rationale in the Mercer case was at odds with the standards of the Commerce Clause when it determined that the plan was discriminatory. The Third Circuit found that the district court should have focused on the process of selecting the in-state site to verify it was open, fair and nondiscriminatory; the duration of the designation; and the ability to amend the ordinance to add additional sites. In light of these factors, the Third Circuit also remanded the Mercer case to the district court with directions to apply the appropriate legal standards.

The Third Circuit, similar to the analysis applied in the Chester County case, considered the Pennsylvania Act, designation process, potential for discriminatory effect, amendment process and any evidence of economic favoritism that might suggest or refute a Commerce Clause violation. The designation of a single in-state site, unlike the Chester County plan, seemed to mitigate any arguments of a Commerce Clause violation. Although it did not declare the ordinance constitutional, the court stated it was not convinced that the Mercer ordinance was discriminatory.

According to the Third Circuit, "Mercer County made a significant attempt to open its designation process to out-of-state sites" by soliciting bids from facilities nationwide. Although the court

151. See Harvey, 68 F.3d at 807. The Third Circuit stated that the district court's decision could be affirmed, despite the erroneous legal standard, if it was convinced that the process of designating the in-state facility was discriminatory. See id. The court determined, however, that the record did not show that the designation was discriminatory. See id. Therefore, the court concluded that it could not affirm the district court's invalidation of the Mercer Plan. See id. at 809.

152. See id. at 807. The court held that the district court's examination, which excluded an investigation into the designation process, was at odds with its conclusion that such processes are important in determining discriminatory effect. See id.

153. See id. at 809.

154. See id. at 808-09. The court considered the impact of the Pennsylvania Act in the same manner as it had in the Chester County case. See id. at 807-08. The court did not provide an additional discussion of the Act other than stating that it had been previously considered and that a similar discussion would be unnecessarily duplicative. See id. at 808.

155. See id. at 807. "[T]hat only one in-state site has been selected under the county's designation process provides less evidence that the process has a discriminatory effect-that is, that the process tends to select in-state sites than if a greater number of in-state sites had been selected in the designation process." Id.

156. See Harvey, 68 F.3d at 807.

157. See id. at 808. The Third Circuit highlighted the appearance of fairness and openness of the Mercer ordinance by juxtaposing it against both the Chester ordinance and the facially discriminatory act invalidated in Atlantic Coast Demolition
largely accepted the district court's determination that the designation process was fair on its face and in its intent, it did suggest doubt over whether a discriminatory effect existed.\textsuperscript{158} For example, the court noted that only four of the twenty-three facilities which received application materials eventually submitted proposal packages to the county.\textsuperscript{159} Despite the high attrition rate of out-of-state applicants who requested proposal materials, the Third Circuit concluded that the process seemed to be "fair, open and competitive."\textsuperscript{160}

The court believed that, unlike the facts in the \textit{Chester County} case, Mercer's relative lack of economic interest suggested a nondiscriminatory motive.\textsuperscript{161} The only economic benefit that Mercer was receiving as a result of the designation, was a $1.00 surcharge for each ton of waste.\textsuperscript{162} The court agreed with the district court's finding that this nominal financial gain seemed to suggest little motivation for economic protectionism on behalf of the county.\textsuperscript{163}

Although the court discussed the potential for amending the ordinance to include additional facilities, the topic was discussed only summarily.\textsuperscript{164} The court concluded that the designation of one facility was a permissible monopoly because Mercer County was unlikely to have a need for an additional facility due to the lack of waste volume.\textsuperscript{165} Consequently, the lengthy ten year contract was 

\textsuperscript{158} \textit{Recycling v. Board of Chosen Freeholders}. See id. The court stated that "[u]nlike \textit{Atlantic Coast}, where the scheme had the explicit goal of securing in-state disposal capacity, Mercer County officials testified that no preference was given to in-state or out-of-state facilities. And unlike Chester County, Mercer County prepared detailed bid specifications and advertised . . . nationwide." \textit{Id.}

\textsuperscript{159} See id.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{See Harvey}, 68 F.3d at 808.

\textsuperscript{162} See id.

\textsuperscript{163} \textit{See id.} The court recognized that this factor alone would not save the ordinance from invalidation. \textit{See id.} However, it realized that this was another factor to refute the contention that there was an uneven playing field. \textit{See id.}

\textsuperscript{164} \textit{See id.} at 809.

\textsuperscript{165} \textit{See id.} Aside from Mercer County's determination that additional facilities were not necessary due to the lack of waste volume, the district court held it advisable and "most efficient" for the county to utilize just one facility. \textit{Id.}
permissible and not considered evidence of a discriminatory motive.\textsuperscript{166}

Finally, the Third Circuit determined whether Mercer County engaged in economic favoritism since the ordinance provided for a tipping fee which exceeded market rates for similar services.\textsuperscript{167} The court declared that even if the fee were for the duration of the contract, it would not suggest economic favoritism unless the rate was unreasonable at the time the contract was created.\textsuperscript{168} The court concluded that Mercer County had agreed to the high fee, not in an attempt to confer an economic windfall on the facility, but rather, because it feared that the fees would continue to escalate.\textsuperscript{169}

B. Judge Nygaard's Dissent

In his dissent, Judge Nygaard opined that the majority erroneously focused on the fairness of the designation process.\textsuperscript{170} He reasoned that concentrating on the process ignored the fact that “[d]iscriminatory purpose or effect triggers heightened scrutiny.”\textsuperscript{171} Judge Nygaard concluded that the county flow control ordinances had the effect of discriminating against interstate commerce and were thus subject to the heightened scrutiny test.\textsuperscript{172} He deter-

\begin{itemize}
\item \textsuperscript{166} See Harvey, 68 F.3d at 809. Although the court recognized that the ten year contract could be considered a monopoly for the designation period, it suggested that an easier case would be presented if the monopoly did not preclude the losing contractors from participation in the Mercer market for so long. \textit{See id.} at 809 n.19.
\item \textsuperscript{167} See \textit{id.} at 809. Based on the evidence, the court concluded that it was unclear whether tipping fees, like the service contract, were locked in for the same ten year term. \textit{See id.}
\item \textsuperscript{168} See \textit{id.} The court highlighted this point by stating “[a]lthough the County appears to have made a ‘bad bet’ on the price of long term waste disposal, the market could just as easily have moved in the opposite direction and made county officials look financially savvy.” \textit{Id.} The court went on to compare the Mercer ordinance with the Chester ordinance, noting the differences between the contract fee and the market rate at the time were much greater in the Chester case. \textit{See id.}
\item \textsuperscript{169} See \textit{id.} at 809 n.21.
\item \textsuperscript{170} See \textit{id.} at 809-11 (Nygaard, J., dissenting).
\item \textsuperscript{171} See Harvey, 68 F.3d at 810. Judge Nygaard stated that the designation process was irrelevant because “[t]he outcome of a selection process, however open that process may be, can be discriminatory in its practical effect.” \textit{Id.} He continued to state that “[a]s in the Carbone case, ‘the real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce.’” \textit{Id.} In an accompanying footnote, Judge Nygaard wrote, “[s]ignificantly, the Carbone court did not engage in an analysis of the process by which the Clarks-town facility was selected. It looked only to the effect.” \textit{Id.} at 810 n.1.
\item \textsuperscript{172} For a discussion of the two tests that courts apply to alleged Commerce Clause violations, see \textit{supra} notes 30-38 and accompanying text.
\end{itemize}
mined that the Mercer holding should be affirmed and the Chester holding should be reversed and remanded.¹⁷³

Judge Nygaard argued that both the Chester and Mercer ordinances should be invalidated. As support for his position, he pointed out that Carbone holds unconstitutional all flow control ordinances that are coupled with a designation.¹⁷⁴ He then applied the discriminatory test after concluding that the Chester and Mercer ordinances were flow control measures with a designation, and therefore, were discriminatory.¹⁷⁵ Judge Nygaard ultimately found both ordinances unconstitutional, reasoning that, although legitimate local purposes existed for the acts, nondiscriminatory alternatives were available to both counties.¹⁷⁶

V. CRITICAL ANALYSIS

In Harvey, the Third Circuit analyzed whether the Chester or Mercer County ordinances violated the Dormant Commerce Clause. The Third Circuit remanded both cases to their respective district court to examine whether the counties’ waste disposal facility designation processes were fair and open to out-of-state parties.¹⁷⁷ In evaluating the Third Circuit’s opinion, there appears to

¹⁷³. See Harvey, 68 F.3d at 810.

¹⁷⁴. See id. Judge Nygaard’s adoption of a broad interpretation of Carbone is evident from a reading of his opinion in Harvey. In his dissent he wrote, “[i]n Carbone the Supreme Court held that a flow control ordinance coupled with a designation discriminated in its effect because it allowed only the designated operator to provide waste services within the geographical limits of the municipality.” Id. The Pike balancing test would therefore be inappropriate because it is only used when evaluating ordinances imposing burdens on interstate commerce that are nondiscriminatory. See id.

For a discussion of other courts adopting this broad interpretation of Carbone, see supra notes 75 & 77-80 and accompanying text.

¹⁷⁵. See id. at 810-11. Judge Nygaard concluded that the ordinances under review fit into the class of ordinances invalidated under Carbone, namely, ordinances with a designation, because both ordinances “mandate[ ] that waste be delivered only to a designated facility.” Id. at 810.

¹⁷⁶. See id. at 811. Judge Nygaard stated:

For example, the county might seek assurances of ten years capacity from a few disposal facilities without then requiring all county-generated waste actually to be disposed of at those same specific facilities. The goal of providing ten years of disposal capacity need not require that each facility, to accept waste, must provide an assurance of ten years of capacity. Like the municipality in Carbone, the county in each of the cases before us has open to it “any number of nondiscriminatory alternatives for addressing the . . . problems alleged to justify the ordinance in question.” Id. (quoting Carbone, 511 U.S. at 393). For a discussion of alternative nondiscriminatory purposes which have been suggested by other courts and commentators, see infra notes 191-238 and accompanying text.

¹⁷⁷. See id. at 809.
be sufficient evidence to decide the issue without remand since, regardless of the importance attached to the designation process, the ordinances would survive challenge under either of the tests used to evaluate Commerce Clause validity.  

A. Designation Process is Non-Essential in Determining the Validity of a Flow Control Ordinance

The Third Circuit possessed sufficient evidence to render a final decision in *Harvey*. The Supreme Court, circuit courts and district courts have consistently decided cases questioning the constitutional validity of flow control ordinances under the Dormant Commerce Clause without requiring information regarding the designation process. Given this history, the attributes of the designation process are not integral in a Commerce Clause analysis. Therefore, the Third Circuit unnecessarily focused on the designation process, while it could have resolved the Commerce Clause issues in *Harvey*.

B. The Chester and Mercer Ordinances Are Valid Under the Strict Scrutiny Analysis Applied to Acts Which Discriminate in Purpose or Effect

Presuming the challenging parties could prove the ordinances were in fact discriminatory, thus invoking strict scrutiny, the counties would be able to meet their burden by proving that the ordinances served legitimate purposes and that those purposes could not have been served as well by available non-discriminatory means. Therefore, if the counties could survive strict scrutiny,

178. Presuming the court found that Harvey and Tri-County had proven the ordinances discriminated in purpose or effect, additional evidence regarding the designation process would be irrelevant. Regardless of whether additional evidence suggested the designation process was discriminatory, this evidence would not change the burden on the counties if the ordinances were already subject to strict scrutiny. *See Carbone*, 511 U.S. at 392-93 (citing Maine v. Taylor, 477 U.S. 131 (1986)).


180. In *Harvey*, the majority wrote that if the defendant can establish that there is a "legitimate local purpose" and that the interest could not be served "as well" by "available nondiscriminatory" alternatives, the defendant will prevail and the act will be constitutional despite its discriminatory effects. *Harvey*, 68 F.3d at 797 (citations omitted).
their ordinances would be constitutional, regardless of additional fact finding regarding the designation process.

Under the discriminatory purpose or effect test, the challenging party has the burden of proving that the act in dispute discriminates against interstate commerce. After this is established, the governmental entity which promulgated the act can only prevail where it demonstrates that the act serves a legitimate local purpose, and that this purpose could not be served as well by available non-discriminatory means. Both the Chester and Mercer County ordinances meet these burdens.

1. Legitimate Local Purpose

The Supreme Court, other federal courts, both houses of Congress, state legislatures, county governing bodies and EPA recognize long term planning for municipal waste as a legitimate local concern. Flow controlling waste is just one method by which municipalities attempt to achieve this goal. The primary purpose of long-term waste management planning through flow control ordinances is to preserve the citizen's health, safety and general welfare. Even courts which have held flow control ordinances to be a violation of the Commerce Clause have commented that the goals of the

For a discussion of the tests and burdens accorded each party in a suit alleging violations of the Dormant Commerce Clause, see supra notes 31-38 and accompanying text.

181. For a discussion of the burden on the challenging party, see supra note 31 and accompanying text.

182. See Maine v. Taylor, 477 U.S. 131, 138 (1986). For a discussion of how a state or political subdivision can rebut a showing of discrimination, see supra notes 32-33 and accompanying text.


EPA, in its amicus brief in Hybud Equip. Corp. v. City of Akron, stated that “flow control laws mandating local waste disposal to ensure the economic viability of designated local waste facilities are in accord with national environmental and energy policy.” Roddewig & Sechen, supra note 9, at 804.

184. See Harvey, 68 F.3d at 792 (stating “[s]ecuring long term access to disposal facilities necessary to protect the citizens’ health and safety ‘requires long term commitments, debt and security’”) (quoting Petersen & Abramowitz, supra note 9, at 373 n.66); see also PA. STAT. ANN. tit. 53 § 4000.102(a) (20) (West Supp. 1997) (stating purpose of act is to authorize, among other things, municipalities to flow control waste since “[a]ll aspects of solid waste management, particularly the disposition of solid waste, pose a critical threat to the health, safety and welfare of the citizens of this Commonwealth”).
ordinances were legitimate. Given the wide recognition of long term waste planning and flow control ordinances Chester and Mercer Counties would have little difficulty satisfying the legitimate local purpose element of the test.

Another legitimate local purpose of flow controlling waste is to ensure adequate funding for expensive waste facilities, which municipalities are becoming increasingly required to maintain. Financing waste facilities is not a distinct goal in and of itself; rather, it is viewed as a means of ensuring that the larger goals of health, safety and welfare is realized through the provision of adequate waste facilities. Since courts are willing to recognize the legitimate purpose of protecting health and the environment, it follows that these courts would also recognize the means necessary to achieve these purposes as legitimate.

2. The Purpose Could Not Be Served “As Well” by Available Non-Discriminatory Means

Chester and Mercer Counties can also meet their burdens under the second part of the discrimination test. This prong requires the challenged party, to demonstrate that the available alternatives were non-discriminatory and could not serve the purposes of the ordinances as well as the flow control measures under review. Chester and Mercer Counties can establish that the suggested alternatives are either unavailable, discriminatory, or would

185. For example, Judge Nygaard, who believed that the flow control ordinances of both Chester and Mercer Counties should have been found unconstitutional, stated that the counties' ordinances have "laudable goals." Harvey, 68 F.3d at 811.

186. Making sure that municipal bonds are adequately backed with revenue is necessary to give the bonds attractive ratings needed to entice investors. For a discussion of the negative effects that improper revenue assurances have on bond ratings, see supra note 7, infra note 241 and accompanying text.

Without positive ratings, cautious investors will place their money in alternative investments with greater security. See William A. Klein & John C. Coffee, Jr., Business Organization and Finance 233 (6th ed. 1996) (stating "[a] critical axiom of modern investment analysis is that in their . . . investment decisions the overwhelming majority of people are risk averse"). For a discussion of the great expense associated with the construction and maintenance of modern waste facilities, see supra notes 7 & 13 and accompanying text.

187. See Harvey, 68 F.3d at 792 (citing Petersen & Abramowitz, supra note 9, at 373).

188. This is not to suggest that financing measures alone are legitimate purposes which would enable a municipality to discriminate against interstate commerce, for this has been expressly precluded by the Supreme Court. See Carbone, 511 U.S. at 393 (stating "[b]y itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce").

189. See Harvey, 68 F.3d at 797 (quoting Maine v. Taylor, 477 U.S. at 137).

http://digitalcommons.law.villanova.edu/elj/vol9/iss1/6
not serve the legitimate purposes as well as the ordinances they adopted. A showing of any one of these factors would satisfy the counties' burdens under the strict scrutiny test and result in the validity of the flow control ordinances.\(^{190}\)

Suggested alternatives to the legal flow control employed by the counties in the present case are increased taxes or issuance of general revenue bonds, economic flow control, flow control by municipal haulage, contract flow control, franchise flow control, and uniform safety regulations.

\textit{a. Increased Taxes/Issuance of General Revenue Bonds}

The \textit{Carbone} Court suggested that flow controlling waste was not the only means to ensure long-term survival of waste disposal facilities.\(^{191}\) Instead, the Court reasoned that municipalities could achieve similar purposes through the issuance of general revenue bonds\(^ {192}\) or by raising taxes.\(^ {193}\) Although these options are both non-discriminatory and available, these alternatives would not serve Chester and Mercer Counties' legitimate purposes as well as the flow control ordinances under review in \textit{Harvey}.

Unlike flow control plans which finance a facility with revenue raised from minimum tonnage guarantees, a plan utilizing taxes or bonding simply finances the facility by raising taxes or selling bonds.\(^ {194}\) Absent from these alternatives is the guaranteed mini-

\(^{190}\) The analysis of the Third Circuit indicates that Chester and Mercer Counties could satisfy their burdens under the discrimination test by demonstrating that the legitimate local purpose could not be served (1) as well by; (2) available; and (3) nondiscriminatory means. \textit{See Harvey}, 68 F.3d at 797. The inclusion of these three elements in the test indicates that if a party can demonstrate that any one element cannot be met through the adoption of an alternative, the discriminatory ordinance survives strict scrutiny. \textit{See Maine}, 477 U.S. at 142-52 (1st Cir. 1986)(applying these elements to Maine baitfish law and finding law constitutional).

\(^{191}\) \textit{See Carbone}, 511 U.S. at 394.

\(^{192}\) \textit{Id.} General obligation bonds are defined as "bond[s] secured by the 'full faith and credit' of the issuing government and backed by revenues from its taxing power." \textit{Black's Law Dictionary} 179 (6th ed. 1990).


\(^{194}\) A municipality could also choose a hybrid of the two options. For example, if a municipality chooses to issue general obligation bonds to finance a waste facility, the debt generated from those bonds, by definition, are paid for through the taxing power of the municipality. \textit{See Petersen & Abramowitz, supra note 9}, at 370-71, 404-07 & n.54. Therefore, because of the nature of these bonds, if a municipality chooses to issue them to finance a facility, it necessarily raises taxes to pay for the facility. Thus, a hybrid plan invoking both the taxing and bonding alternatives is created. \textit{See generally Petersen & Abramowitz, supra note 9}, at 369-73 (explaining the different issues in financing waste management).
mum tonnage found in flow control ordinances. This guarantee of a predictable amount of waste encourages recycling.\(^\text{195}\) Without such guarantees, waste service providers cannot rely on sufficient amounts of recoverable waste to warrant the large expense of constructing and maintaining recycling facilities.\(^\text{196}\) Therefore, plans to finance waste facilities through raising taxes or issuing bonds do not guarantee minimum amounts of waste and will not encourage waste recovery and recycling. As such, flow controlling waste achieves a higher level of environmental and health protection than simply raising taxes or issuing bonds. As a result, although available and nondiscriminatory, these options do not qualify as alternatives which serve legitimate local purposes as well as flow control.

b. **Economic Flow Control**

Chester and Mercer Counties can meet their burden under the discrimination test by establishing that economic flow control does not serve legitimate local purposes as well as legal flow control. Further, the constitutionality of economic flow control is questionable, and thus, may not qualify as a nondiscriminatory alternative.

Economic flow control, which is the type of flow control utilized by Chester and Mercer Counties and at issue in *Harvey & Harvey, Inc. v. County of Chester*, creates hidden expenses.\(^\text{197}\) Specifically, “[t]he need to subsidize tipping fees . . . merely add[s] transaction costs to local government efforts aimed at improving the reliability and quality of solid waste management.”\(^\text{198}\) Thus, even assuming

\(^{195}\) For a discussion of how flow controlling waste encourages recycling efforts, see *supra* note 19 and accompanying text.

\(^{196}\) For a discussion of how flow control guarantees sufficient amounts of recyclable waste, see *supra* note 19 and accompanying text.

\(^{197}\) See Petersen & Abramowitz, *supra* note 9, at 404-07.

\(^{198}\) See *Municipal Solid Waste Flow Control, 1993: Hearing on H.R. 1357 and H.R. 2649 Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d. Cong. 235 (1993) (joint statement of the U.S. Conference of Mayors and Municipal Waste Management Association). The statement, in pertinent part noted that “[s]ubsidies to lower tipping fees are simply alternative means of ensuring that local interests bear the costs of financing solid waste facilities. Legal flow control better reflects the overall social costs of solid waste management and helps to allocate the responsibility to individual waste generators.” *Id*. Therefore, in addition to not serving the objectives of legal flow control (the type of flow control employed by Chester and Mercer Counties) as well as being more expensive, economic flow control does not serve the purposes of waste planning as well because it does not spread the costs evenly. *See id.* at 236. As a result, economic flow control would have the result of causing local parties to incur disproportionate costs from the disposal of non-local waste. *See id.* This demonstrated inequity shows that economic flow control does not serve legitimate purposes as well for at least two reasons.
that economic flow control can achieve the same results as legal flow control, it does so at a greater expense.\textsuperscript{199} Therefore, economic flow control does not serve the legitimate purpose of effective waste management as well as legal flow control.\textsuperscript{200}

Even if economic flow control could serve Chester and Mercer Counties' purposes as well as the ordinances at issue, there is some doubt regarding its constitutional validity.\textsuperscript{201} At least one district

\textsuperscript{199} See id. at 234-36. Based on economic realities, increased transaction costs would force municipalities and counties to pay more for proper waste disposal under economic flow control than under the legal flow control mechanisms adopted by Chester and Mercer Counties. See id. at 231-36.

\textsuperscript{200} The below market tipping fees that are characteristic of economic flow control would guarantee that the facility would be patronized. See id. at 227-28. Because municipalities cannot impose waste import restriction bans to limit out-of-state parties from taking advantage of the reduced fees, facilities are at the mercy of every outside hauler in the country who was looking to reduce their expenses by patronizing the artificial market. See id. at 233-34. As a result, landfills which have these fee structures would reach capacity sooner than higher priced facilities, which forces municipalities back into the waste disposal crisis. See id. at 229-32.

Economic flow control also has political and public policy problems which are not characteristic of legal flow control. See id. at 233-36; see also Petersen & Abramowitz, supra note 9, at 404-07. A municipality may issue revenue bonds to finance a project if those bonds are backed by a revenue stream like that provided in legal flow control. See id. at 234. Without the revenue stream guaranteed by legal flow control, municipalities would be forced to issue general obligation bonds. See id. at 235. General obligation bonds depend on taxes, special assessments or mandatory user fees for repayment. See id. General obligation bonds are frequently issued to pay for schools and other essential infrastructure which do not provide a steady stream of revenue. See id. at 231. Because of state limitations on municipal debt, general obligation bonds are not unlimited and should be reserved for municipal functions including schools and police departments. See id. at 231, 234. Moreover, since most waste authorities lack the power to issue general obligation bonds, revenue bonds are the only option, and one which can only be pursued with the steady revenue stream that flow control ordinances provide. See id. at 234-35. In light of the fact that these financing drawbacks are not present with legal flow control, economic flow control cannot serve the same purpose of responsible waste management as well as legal flow control. See id. at 233.

\textsuperscript{201} Economic flow control can be criticized on the same grounds as legal flow control, because it is also exclusive. See Waste Flow Control Hearing, supra note 9, at 233. Economic flow control limits both the opportunities to haul waste and where that waste can be hauled. See id. Because of this exclusivity, economic flow control stands on dubious constitutional ground, and is therefore, not a nondiscriminatory alternative. But see Petersen & Abramowitz, supra note 9, at 406-07 (explaining while economic flow control appears constitutionally valid, court in Mid-American Waste Systems, Inc. v. Fisher noted economic flow control "could be considered to violate the Commerce Clause"). If Judge Nygaard's interpretation of Carbone in his Harvey dissent is accurate, any flow control measure coupled with a designation is discriminatory. As such, economic flow control does not qualify as a nondiscriminatory alternative to legal flow control. The same result would occur under many other courts' analyses, which have interpreted Carbone with the same breadth as Judge Nygaard. There is significant doubt as to the validity of any flow control ordinance which is coupled with a designation.

For a discussion of Judge Nygaard's interpretation of the Carbone decision, see supra notes 174-75 and accompanying text. For a discussion of other courts which
court has held that the imposition of fees on waste generators could be a violation of the Commerce Clause.202 Importantly, the Harvey court had the benefit of the Carbone decision as a guide in making such a determination.203 Thus, there is cause for questioning whether economic flow control would indeed be a non-discriminatory alternative.

c. Flow Control By Municipal Haulage

Flow control by municipal haulage requires local governments to privatize the waste collection and transportation industries.204 As a result, local governments are forced to hire additional personnel and to purchase new vehicles and equipment to collect waste.205 Perhaps the largest drawback of this alternative is the expense associated with purchasing new equipment and hiring additional employees to provide these services.206 The immediate result of such a plan would require the incurrence of greater debt than the counties have already assumed.207

Additionally, because a municipal haulage plan requires the operation of trucks and other equipment, transportation of waste, and maintenance of larger work forces, the county exposes itself to have adopted a broad reading of Carbone, see supra notes 75 & 77-80 and accompanying text.


204. See Petersen & Abramowitz, supra note 9, at 396. Although this alternative is described as the least likely to be held unconstitutional, under the broad reading of Carbone, courts may invalidate such a plan if the privatization of the market resulted in excluding certain participants. See id. Unfortunately for Chester and Mercer County, they would have to exclude all or a substantial part of private hauling to meet their goals of ensuring a certain minimum tonnage. See generally Harvey, 68 F.3d at 794-96 (explaining concerns surrounding choices made by counties in choosing waste disposal sites). Thus, although flow control by municipal haulage could survive constitutional scrutiny where exclusivity is not dominant, such exclusivity would likely be necessary to serve the goals of Chester and Mercer County. See id. Therefore, municipal haulage may not qualify as a nondiscriminatory alternative.

205. See Petersen & Abramowitz, supra note 9, at 397.

206. See id. If Chester and Mercer Counties would have pursued this option to ensure that the designated facilities received the appropriate amounts of waste, they would have had to purchase new trucks and other equipment in volumes large enough to service the waste collection, transportation and processing needs of an entire county. See id.

207. See id. Because adoption of such a plan requires such a "great commitment of resources," the majority of governments have declined to adopt it. See id.
liability which is not characteristic of legal flow control.\(^{208}\) Similarly, a large part of municipal motivation for adopting flow control ordinances to finance waste disposal sites is to ensure that waste is disposed of in an environmentally responsible fashion, thus complying with federal and state environmental regulations.\(^{209}\) Compliance with these regulations is not assured where the county’s involvement is limited to just the haulage of waste. Waste processing facility compliance simply cannot be assured by the counties where they have no involvement in the operation and oversight of the landfill.\(^{210}\)

Further, government motivation for flow controlling waste is to fill the waste processing facility shortage that has resulted since the 1970’s and 80’s.\(^{211}\) Increasing the dependence on private facilities through measures like flow control by municipal haulage only exacerbates this crisis, ultimately leading to greater environmental degradation.\(^{212}\)

\(^{208}\) See id. (stating active roles required of governments adopting municipal haulage plans results in “increase in potential liability”). Such active participation of the county is not required under legal flow control, since under that type of plan, the municipality need not be involved in operating a fleet of disposal trucks and hiring additional employees to operate that machinery.

\(^{209}\) See Waste Flow Control Hearing, supra note 9, at 19 (statement of Bruce Weddle, Director, Municipal and Industrial Solid Waste Division, EPA). Mr. Weddle stated:

> Concern was raised by the private sector over the potential liability forced on them in the event that a facility was forced to use a certain site and that site later became subject to cleanup under Superfund. In essence, what they are saying is that they would sign a contract requiring them to use an individual facility, they would have no choice in that facility. That facility may not be a facility operated in compliance with all rules and regulations and that would subject the company to Superfund liability later.

Local governments, at least some local governments, look to the very same situation and saw flow control as a way for them to designate a facility and thereby reduce the likelihood that they would be involved in Superfund liability down the road, because they could assure that facility was operated in compliance with all the rules and regulations.\(^{16}\)

\(^{210}\) See id.

\(^{211}\) For a discussion of the need for public bodies to fill the waste disposal facility crisis after large scale closures of private facilities, see supra notes 9-12 and accompanying text.

\(^{212}\) This is the necessary result because, unlike legal flow control, a municipal haulage plan does not encourage the construction of publicly owned facilities since the municipality need only involve itself in the haulage end of the business. Without the construction of new facilities in response to facility closures which have characterized the waste disposal crisis, disposal capacity will continue to shrink as demand for waste disposal facilities increases. See generally Wolf, Solid Waste Crisis, supra note 4, at 529-39 (commenting on trend away from using only landfills and toward creating waste management systems to deal with solid waste). For a discussion of the waste disposal crisis and the increasing amount of waste that
Therefore, municipal haulage does not serve the same purposes as legal flow control because it places heavier financial and liability burdens on government and aggravates the waste facility shortage crisis. As a result, flow control by municipal haulage exaggerates the negative environmental effects of delaying effective waste management, and accordingly does not serve the legitimate purposes of waste management as well as legal flow control.  

Finally, although this alternative is described as the least likely to be held unconstitutional, under the broad reading of Carbone, courts may invalidate such a plan if the privatization of the market results in the exclusion of private participants. Unfortunately, Chester and Mercer Counties would have to exclude all or a substantial part of the private hauling industry to meet their goals of ensuring an established minimum tonnage. Consequently, although flow control by municipal haulage could survive constitutional scrutiny where exclusivity does not dominate the plan, such exclusivity would likely be necessary to serve the goals of Chester and Mercer Counties. Therefore, as required by their disposal needs, municipal haulage may not qualify as a nondiscriminatory alternative.

d. Franchise and Contract Flow Control

Because franchise and contract flow control are characterized by increased costs and more onerous restrictions on the waste hauling industry, this option cannot serve the purposes of responsible

213. Flow control by municipal haulage also has unconstitutional effects which, although not part of the legal calculus, should be considered for public policy reasons. Because flow control by municipal haulage requires the monopolization of the haulage industry by the adopting county, such a plan can be harsh on private business which previously provided collection and haulage services. See generally Interstate Transportation, supra note 4, at 11-12 (statement of Christine Todd Whitman, Governor, State of New Jersey) (explaining while local and state governments have key roles in waste management, "we need to find a balance, a balance between protecting the market place and preserving waste management systems designed to meet many goals including reasonable cost"). These impacts would particularly effect small local businesses. For a discussion of the manner in which flow control benefits small business, see Impact of Solid Waste, supra note 19, at 230-32 (letter from local government coalition for Environmentally Sound Municipal Solid Waste Management to Rep. Myers).

214. See Petersen & Abramowitz, supra note 9, at 396-97 ("The only argument that could potentially succeed, however, is a Carbone-based contention that, should the municipality attempt to exclude all competition from private haulers, it would be impermissibly regulating interstate commerce.").
waste management as well as legal flow control. Further, franchise and contract flow control, like other alternatives, are of dubious constitutional validity and may not qualify as a nondiscriminatory alternative.

Contract flow control requires municipalities to first monopolize the waste haulage market. Municipalities can then contract with private service providers to haul waste pursuant to the terms of the county’s contract. Like legal flow control, at least in terms of the needs of Chester and Mercer Counties, the contract could require a hauler to deliver waste to a designated facility.

Franchise flow control, like contract flow control, also requires municipalities to establish a monopoly over the local waste collec-

215. In the case involving Chester and Mercer Counties, these schemes would be more disruptive than legal flow control. For example, under the legal flow control plans of Chester and Mercer Counties, any number of parties could participate in the waste hauling market while the number of landfills was limited to three facilities and one facility, respectively. See Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788, 794-96 (3d Cir. 1995) (explaining counties’ reasoning supporting their waste management plans). If Chester and Mercer Counties had monopolized the market and adopted either contract or franchise flow control, the counties would have had to confer contracts on a limited number of hauling companies, thus limiting the total number of haulers. See Petersen & Abramowitz, supra note 9, at 397-404 (explaining basic concepts of contract and franchise flow control). Additionally, to achieve the legitimate purpose of financing the waste facility, Chester and Mercer Counties would also have to impose a condition in the franchise or contract agreement limiting the haulers to dumping waste at the designated facilities. See id. (highlighting that part of negotiated terms between private hauler and municipality include facility designation). As a result, under franchise or contract flow plans, both the waste haulage and the waste processing market would be conferred upon a fortunate few. See id. As a result, these alternatives may not qualify as nondiscriminatory alternatives. But see Petersen & Abramowitz, supra note 9, at 395 (“Because the Carbone decision on its face does not address non-legislative forms of flow control, there remain four viable alternative methods that should withstand Commerce Clause challenges by which local governments can ensure that waste is delivered to the desired facilities... [including] contract flow control [and] franchise flow control.”).

216. For a discussion of the broad interpretation of Carbone, and the doubt that has been cast over the constitutionality of all flow control measures, including franchise and contract flow control, see supra notes 75 & 77-80 and accompanying text.

217. See Petersen & Abramowitz, supra note 9, at 397. Contract flow is described as follows:

[It] is achieved when a local government effectively monopolizes solid waste collection and then contracts out to one or more haulers to provide collection services on behalf of the municipality. The contract typically includes a negotiated provision, voluntarily agreed to by the hauler, in which the municipality designates a disposal site or reserves to itself the ability to do so in the future.

Id.

218. See id.

219. See id. at 397-98.
tion market. After doing so, local governments grant franchises to selected parties. These franchises could grant service providers property rights, like use of publicly owned facilities, as well as the contractual rights which were granted under contract flow control schemes. Under the government’s contract rights, conditions can be imposed on selected haulers.

Primarily, the validity of franchise and contract flow control as viable alternatives is questionable in light of Carbone. Although the court did not specifically speak to the issue, the legality of any non-legislative flow control measure is uncertain. If Judge Nygaard’s and the majority of courts’ view of Carbone is accepted, any flow control ordinance coupled with a designation is discriminatory. Franchise and contract flow control plans would likely contain these two attributes, and thus may not qualify as a non-discriminatory alternative.

Similarly, both alternatives have the potential to discriminate as a result of exclusivity in awarding franchises or contracts. To achieve the purposes of the county or municipality, the benefits of a franchise or contract would likely be conferred on one or a few service providers. The same constitutional arguments that are

220. See id. at 398-404. To establish a monopoly over the local waste collection market, “[a] grant of a solid waste collection franchise is a grant by a government to authorize one or more private companies to provide solid waste collection services on behalf of the government” for “services and functions that the government itself is obligated to furnish to its citizens.” Id. at 399.

221. See id. at 400. Under this type of plan, a franchisee “receives only those powers [which] the government [gives to it].” Id.

222. See Petersen & Abramowitz, supra note 9, at 400.

223. See id. Because the government has the power to exclusively control the waste disposal market, those powers that are not delegated to the haulers through the franchise would be reserved by the municipality. See id. at 400-01. Therefore, “[b]y reserving this power to itself when it grants a waste collection franchise, the government, as the monopolizing entity, retains the authority to impose flow control.” Id. at 400. Thus, the franchise is, in part, contractual in nature, and the municipality can require that the hauler dump the waste at a specified site as a condition of that contract. See id.

224. For a discussion of the broad interpretation of Carbone, which has the effect of invalidating most or all flow control measures, see supra notes 75 & 77-80 & 174-75 and accompanying text.

225. See id.; see also Petersen & Abramowitz, supra note 9, at 402.

226. For a discussion of the broad interpretation of Carbone, which has the effect of invalidating most or all flow control measures, see supra notes 75 & 77-80 & 174-75 and accompanying text.

227. See Petersen & Abramowitz, supra note 9, at 401 (stating exclusive franchises or contracts are more likely to be challenged on constitutional grounds than nonexclusive plans).

228. Both Chester and Mercer Counties would likely have to provide exclusive contracts or franchises. See Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788, 807-08 (3d Cir. 1995). Chester County would be motivated to adopt an exclu-
leveled against Chester and Mercer Counties in their designation of in-state waste facilities could be made under franchise and contract flow control where the contracts or franchises are conferred only on in-state parties.\textsuperscript{229} Similarly, the Supreme Court has cast great doubt over the validity of plans which invoke such exclusivity.\textsuperscript{230} The Carbone Court's citation of an earlier decision involving franchising casts constitutional doubt on whether these alternatives qualify as nondiscriminatory.\textsuperscript{231}

Further, these plans would require Chester and Mercer Counties to first establish a monopoly over the local waste collection market.\textsuperscript{232} This requirement would require the counties to incur great expenses over and above those already incurred. As a result, franchise and contract flow control schemes may not qualify as an alternative which serves the legitimate local purposes as well as the ordinances under review in \textit{Harvey}.\textsuperscript{233}

Additionally, it has been argued that under franchise and contract flow control schemes, governments may impose requirements of "adhesion, in other words, . . . flow control provisions are forced on haulers that are unable to refuse the terms."\textsuperscript{234} This is a compulsive franchise or contract because exclusive agreements would be necessary to achieve its goals of ensuring that waste was delivered only to the sites which it wished to patronize. \textit{See id.} at 806-07. Mercer County on the other hand would likely only need one or a few service providers because of the lack of waste volume that it needs to service. \textit{See id.} at 808-09.

\textsuperscript{229} For example, the designation of in-state sites under the Chester and Mercer plans is analogous to conferring franchise rights or contract rights to in-state parties. The result of this reality renders franchise and contract flow control, at best, as equally discriminatory as legal flow control. Regardless of the degree of discrimination, however, it would arguably be as discriminatory as the legal flow control utilized by the counties, and would thus not qualify as a nondiscriminatory alternative.

\textsuperscript{230} \textit{See Buck} v. \textit{Kuykendall}, 267 U.S. 307 (1925).

\textsuperscript{231} \textit{See Carbone}, 511 U.S. at 394. The Court's earlier decision in \textit{Buck} dealt with a franchise plan which conferred the use of highways upon the franchise holder to the exclusion of others. \textit{See id.} In \textit{Buck}, the Supreme Court stated the following:

\begin{quote}
[A franchise is] not regulation with a view to safety or the conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner.
\end{quote}

\textit{Buck}, 267 U.S. at 315-316.

\textsuperscript{232} For a definition of how franchise and contract flow control must be administered, including the requirement of first establishing a monopoly, \textit{see supra} notes 217-23 and accompanying text.

\textsuperscript{233} For a discussion of why requiring monopolization renders an alternative non-qualified to serving legitimate local purposes as well as the Chester and Mercer Counties ordinances, \textit{see supra} notes 215 & 229 and accompanying text.

\textsuperscript{234} Petersen & Abramowitz, \textit{supra} note 9, at 403.
ling argument because under these alternatives, a hauler has two options, either to accept the contract terms as they are, or to look for another job. Thus, these alternatives may be unavailable because they appear to lack mutuality and may be invalid under contract law.

e. Uniform Safety Regulations

Uniform regulations are undesirable because increased regulation of the waste services industry is one of the primary reasons why the waste crisis, and the environmental degradation associated with it, exist today. Increased regulations drive up operational costs. Increased costs reduce profitability and are often so substantial that facilities can no longer operate and are forced to close. This, in turn, causes shortages of waste service providers. Therefore, although one would expect regulation of the waste services industry to provide environmental dividends, history has shown that regulations often lead to the very problems for which flow control was invented. Consequently, increased regulations not only

235. See Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701, 704-05 (3d Cir. 1995). In this opinion, the Third Circuit stated that increased environmental regulation is a leading cause of facility closure, shortfalls in disposal capacity, and the overall waste disposal crisis. See id. at 704; see also Harvey, 68 F.3d at 791 (stating increased regulations caused shortages in capacity and increased disposal costs). For a further discussion of the waste disposal crisis and the role that increased regulation has played in causing the crisis, see supra notes 8-11 and accompanying text.

236. For example, compliance with RCRA, the Clean Air Act and other state and federal regulations drive up costs for waste facilities. These costs have been cited as an attributing cause of the waste disposal crisis. See, e.g., Roddewig & Sechen, supra note 9, at 802 (stating "as regulation of the landfill industry increased, costs increased as well"). Therefore, uniform regulations are not an alternative which satisfies the "as well" element of the strict scrutiny test because these regulations will have negative environmental impacts, as they have in the past, which are not associated with flow control. For a discussion the waste disposal crisis and its relation with regulations such as RCRA and the Clean Air Act, see supra notes 8-11 and accompanying text.

237. See id. For a discussion of the assertion that increased costs result in facility closures, see supra notes 8-12 and accompanying text.

238. There are additional drawbacks with increased regulations that will be specific to existing publicly owned waste facilities like Chester County's Lanchester site. To allocate the needed monies to conform with new uniform regulations, governments will necessarily have to pursue options such as raising taxes, issuing new or additional bonds, increasing tipping fees at the facility, or cutting other governmental services. See Interstate Transportation, supra note 4, at 5-6 (statement of Sen. Lautenberg) (explaining that flow control would result in loss of revenue, diminishing funds available for "unprofitable waste management activities, such as recycling and household hazardous waste programs"); see also Waste Flow Control Hearing, supra note 9, at 229-35 (joint statement of U.S. Conference of Mayors and Municipal Waste Management Ass'n) (explaining financial realities of waste management and how these realities will be impacted without flow control). All of
fail to serve legitimate local purposes as well as flow control ordinances, they cause the very problems which flow control plans are adopted to remedy.

Finally, because all of the alternatives, except uniform regulations, are of dubious constitutional validity, they likely do not qualify as nondiscriminatory alternatives. Similarly, none of the alternatives serve the purposes of effective and responsible waste management as well as legal flow control. As a result, even assuming that the legal flow control ordinances of Chester and Mercer Counties are discriminatory, they should withstand constitutional challenge because they pass the strictest test accorded acts under Commerce Clause review.

VI. IMPACT

The repercussions of Harvey, are not only numerous, but are of substantial import to all counties and municipalities in the nation.239 The skepticism which this court's decision has placed on flow control regulation will impact communities legally, financially, environmentally, and socially.

The legal ramifications of the Harvey decision will only increase the trend of invalidating municipal efforts to remedy the problems which have been, and continue to be, associated with waste planning and disposal.240 This invalidation will have negative economic
effects on communities as well. Because of these effects, communities will have to examine other options to deal with the existing problem of overcrowded and environmentally unsound waste disposal facilities. Additionally, legal efforts will result in increased administrative costs. Legal alternatives may prove to be more costly than the plans which the Harvey court put into question. Further, alternative legal maneuvering to avoid Commerce Clause liability is not guaranteed to survive constitutional scrutiny in the future, and these alternative methods may prove to be as controversial and expensive as legal flow control plans. This creates a vicious cycle that will simply delay the effective treatment of waste, which will in turn increase costs, and thereafter increase the negative environmental impacts of delaying effective treatment.

Finally, negative social and environmental effects will be the product of Harvey and other similar cases which have cast substan-

241. See Flow Control Act of 1994: Hearing on S. 2227 Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Env't and Public Works, 103d. Cong. 1-87 (1994) [hereinafter Flow Control Act Senate Hearing]. The invalidation of flow control measures in cases like Carbone, does the following:

[P]uts existing bonds used to finance waste management facilities at significant risk. If localities cannot send an adequate level of trash to a facility to generate the revenue needed to pay off the bonds, obviously they face default and citizens in the affected communities face the possibility of ever increasing high taxes.

Id. at 2. Alternatively stated:

After the Supreme Court decision in Carbone, Moody's Investor Service investigated the economic effect of the loss of flow control and found that landfills and waste-to-energy facilities were losing revenue, and municipalities were having trouble selling bonds to finance facilities. Moody's investigation included a review of the bond ratings of 100 solid waste facilities dependent upon flow control. By June 1995, after analyzing the facilities with a total debt of $4.5 billion dollars, Moody's downgraded the bonds of 14 solid waste management authorities, confirmed 62, and upgraded none. Moreover, it determined that three-fourths of the 76 ratings reviewed had an unfavorable rating outlook due mostly to the potential loss of flow control. Of particular note, Moody's downgraded the waste bond rating of five New Jersey counties to below investment grade status, which is tantamount to labeling them junk bonds. Wolf, Congressional Bailout, supra note 13, at 270.

Similarly, flow control invalidation means that “[t]axpayers are going to be forced to pick up the tab to pay for the deficits run by public facilities that no longer receive sufficient waste flow to pay for them.” Flow Control Act Senate Hearing, supra, at 5 (statement of Sen. Faircloth). Senator Duremberger reiterated the large negative economic effects that flow control invalidation creates when he stated that “[t]oday there are billions of State and local dollars at stake because of the Supreme Court's recent decision in Carbone. In my State of Minnesota alone, that amount of debt stands at $325 million; nationwide, it is as high as $18 billion.” Id. at 3 (statement of Sen. Duremberger).

242. For a discussion of the legal and constitutional problems facing alternatives to legal flow control, see supra notes 191-238 and accompanying text.
tial doubt over the constitutionality of legal flow control. 243 Citizens of municipalities and counties that are unable to establish timely and effective waste processing and disposal plans will be negatively affected because of increased environmental risks, their attendant health problems and potential increased municipal taxes and reduction of services. 244 It is readily apparent that the social atmosphere of every citizen can potentially be altered by the Harvey decision and the invalidation of flow control measures.

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243. See id. (explaining legal and constitutional problems facing alternative methods for flow control). For a discussion of the effects of flow control invalidation on municipal recycling efforts, see supra note 19 and accompanying text.

244. For example, Mr. Randy Johnson, the Commissioner of Hennepin County, Minnesota, and the Third Vice-President of the National Association of Counties, stated that effective waste management and compliance with RCRA was difficult without Congress explicitly authorizing flow controlling waste. See Interstate Transportation, supra note 4, at 107. He continued to state that “[s]afe disposal facilities . . . are a part of the basic infrastructure of our communities” and that “[w]ithout them, economic development cannot occur and health and safety cannot be guaranteed.” Id.